83

1

Supreme Court, U.S.
FILED
07-987 JAN 24 2008
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

MARTIN WISNIEWSKI and
ANNETTE WISNIEWSKI, on behalf of their son
Aaron Wisniewski,
Petitioners,

v.

BOARD OF EDUCATION OF THE WEEDSPORT
CENTRAL SCHOOL DISTRICT and RICHARD
MABBETT, Superintendent of Schools,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Stephen Ciotoli,, Esq.
O'HARA, O'CONNELL &
CIOTOLI
Attorney for Petitioners-Appellants
7207 East Genesee Street
Fayetteville, New York
13066
(315) 451-3810

Susan O. Galbato, Esq.
BOND, SCHOENECK &
KING, PLLC
Attorney for Respondents-Appellees
One Lincoln Center
Syracuse, New York
13202
(315) 218-8370

QUESTIONS PRESENTED FOR REVIEW

1. Whether a public school district may lawfully punish a student for engaging in a private conversation, off of school grounds and not at an event bearing the imprimatur of the district, merely because the subject matter of the speech relates to the District?

2. Whether a public school district may Constitutionally craft a policy to "take all threats seriously" such that any perceived threat automatically creates a "substantial disruption" under *Tinker*?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioners here and appellants below are Martin and Annette Wisniewski, on behalf of their son, Aaron Wisniewski.

The appellees below and respondents here are the Board of Education of the Weedsport Central School District and Richard Mabbett, Superintendent of Schools for said school district.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Petition 14

I. Before Engaging in the Tinker Analysis, Courts Must First Answer the Jurisdictional Question as to Whether a Sufficient Nexus Between the Speech and the School District Exists 15

II. A Policy to "Take All Threats Seriously" Merely Operates as a De Facto Prior Restraint on Constitutionally Protected Student Speech 23

Conclusion 27

APPENDIX

Opinion of the US Court of Appeals, filed 1/15/2008 ..... 1A

Second Circuit's Mandate, filed 7/5/2007 ..... 15A

District Court's Memorandum-Decision and Order, dated 6/20/2006 ..... 17A

District Court's Civil Judgment, dated 6/20/2006 ..... 37A

District Court's Amended Civil Judgment, dated 6/30/2006 ..... 38A

N.Y. Education Law § 3214 (2007) 39A

Order of US Court of Appeals Denying Petition for Rehearing, Filed 10/26/2007 ..... 64A

TABLE OF AUTHORITIES

Cases

Appeal of Ruth Bowen, 35 Ed. Dept. Rep. 136 (1995) 11

Bates v. State Bar of Ariz., 433 U.S. 350, 380, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) 25

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 16, 17, 21

Beussink v. Woodland School District, 30 F. Supp. 2d 1175, 1180 n. 4 (E.D. Mo. 1998) . 17, 18

Broadrick v. Oklahoma, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) 24

Dombrowski v. Pfister, 380 U.S. 479, 491, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965) 25

Emmet v. Kent School District No. 415, 92 F.Supp.2d 1088 (W.D. Wash. 2000)..... 13

Flaherty v. Keystone Oaks School Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003) 17

Gooding v. Wilson, 405 U.S. 518, 520-521 (1972).... 26

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 16, 17

Hormel v. Helvering, 312 U.S. 552, 556 (1941) 14

Jacobs v. Board of School Com'rs, 490 F.2d 601, 604-05 (7th Cir. 1973), vacated as moot 420 U.S. 128 (1975) 24

Killion v. Franklin Regional School District, 136 F.Supp.2d 446 (W.D. Penn. 2001)..... 12, 17

Klein v. Smith, 635 F.Supp. 1440, 1441-42 (D.Me. 1986) 18

Latour v. Riverside Beaver Sch. Dist., 2005 U.S. Dist. LEXIS 35919 (W.D. Pa., Aug. 24, 2005)..... 17, 21, 26

Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 38 (1999)..... 26

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) 24

Morse v. Frederick, 127 S. Ct. 2618 (U.S. June 25, 2007) 14, 16, 17, 18, 20, 21, 23

NAACP v. Button, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963) 25

New York v. Ferber, 458 U.S. 747, 769, n. 24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) 25

Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975)..... 24

Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615, n. 22 (5th Cir. 2004) 17

Resolution Trust Corp. v. Blasdell, 154 F.R.D 675 (D. Ariz. 1993) 10

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980) 25

Thomas v. Board of Education, 607 F.2d 1043, 1052 (2d Cir. 1979) 16, 19, 23

Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) 3, 12-19, 22, 23, 26, 27

Virginia v. Black, 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536 (2003) 25

Virginia v. Hicks, 539 U.S. 113 (2003) 26

Statutes

28 U.S.C § 1331 1

28 U.S.C 1343(a)(3)(4) 1

28 U.S.C. § 1254 (1) 1

28 U.S.C. § 1367 1

42 U.S.C. § 1983 ..... 2, 12

Education Law § 3214(3)(b)(1) 10

N.Y. Educ. L. § 3814 2

N.Y. Education Law § 3214(3)..... 11

Rules

FRE 408..... 11

Regulations

8 NYCRR § 100.2(1)(4)..... 10

Constitutional Provisions

U.S. Const. amend. I..... 1, 11-13, 15

U.S. Const. amend. XIV, § 1 2

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 494 F.3d 34, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1A-16A. The Order of the Court of Appeals denying Petitioner's request for rehearing *en banc* was not officially reported, but a copy is reprinted at 64A-65A, and a copy of the Second Circuit's Mandate is reprinted at 15A-16A. The District Court's opinion was not officially reported, but is available at 2006 U.S. Dist. LEXIS 41017, and is reprinted at Pet. App. at 17A-36A.

JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment on July 5, 2007, and Petitioner's Petition for Rehearing *en banc* was denied on October 26, 2007, a copy of which is reprinted at Pet. App. at 79A-80A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1). The basis for federal jurisdiction in the court of first instance was 28 U.S.C § 1331, 28 U.S.C. § 1367 and 28 U.S.C 1343(a)(3)(4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law ...abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

3. Title 42, Chapter 21, Section 1983 of the United States Code provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..." 42 U.S.C. § 1983.

4. Pursuant to this Court's Rule 14 (1) (f), the provisions of New York Education Law Section 3814 are set forth at Pet. App. at 54A-78A. N.Y. Educ. L. § 3214.

STATEMENT OF THE CASE

In 1969, this Court stated that its' "unmistakable holding" was that students and

teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The case at bar asks this court to examine this oft-cited jurisprudence from the opposite perspective: namely, once a student exits the schoolhouse gate and goes home, to what extent may a public school district invade that student's private affairs and thereafter punish him or her for what they may find?

In the spring of 2001, the Petitioner, Aaron Wisniewski ("Aaron"), was an eighth grade student at the Weedsport Central School District (the "District"), a public school district in rural central New York. He was an excellent student, a good athlete, and popular with his classmates who enjoyed his sense of humor. Aaron, like many students his age, often exchanged instant messages ("IM's") with friends using his mother's personal computer from his home after school hours. Aaron had created a Buddy Icon[1] to attach to his IM's that

---

[1] This case centers on Aaron's "Buddy Icon" created for his use on the America Online, Inc. ("AOL") computer program known as Instant Messenger ("AIM"). There has been much confusion at the initial Superintendent's hearing and in the lower courts' decision as to what the AIM service actually consisted of. Thus, a brief primer on the AIM service's unique format of electronic communication would be beneficial to this Court in deciding this case. First and foremost, AIM is not synonymous with the "internet" or "e-mail," both terms that were used by the courts below. An IM is only viewable by the intended recipient of the message. IM's are not "posted" to the internet like a web page, and can not be accessed by the public at large.

AIM is a free downloadable online service that lets a user communicate with family, friends and co-workers in real time. [http://www.aim.com/help_faq/starting_out/

getstarted.adp?aolp=0]. Using the AIM "Buddy List" feature, a user can see when their "buddies" are online and available to instant message. *Id.* A Buddy List is a separate window that shows all your buddies who are signed on to AOL, CompuServe, or AIM. [http://www.aim.com/help_faq/starting_out/buddylist.adp?aolp=0]. Whenever buddies sign on, their screen names appear in the user's Buddy List, and the user can then communicate with them instantly. *Id.* A user's Buddy List can be augmented at any time, and it can also tell the user if one of their buddies is away from their computer or not currently receiving IM's. *Id.* The Buddy List will sometimes contain a percentage symbol, which indicates that a person on the Buddy List has been warned by another AIM user for sending offensive or annoying messages. *Id.*

A user signs on to AIM by entering through a welcome screen which prompts the user for a unique password, which serves to protect AIM users from unauthorized use of their AIM account. [http://www.aim.com/help_faq/starting_out/password.adp?aolp=0]. A user sends IM's by double-clicking a buddy's name from their Buddy List, typing in the message they wish to convey, and clicking Send. [http://www.aim.com/help_faq/starting_out/sending_ims.adp?aolp=0]. Users can also create small "Buddy Icons" that accompany their messages to their buddies. [http://www.aim.com/help_faq/using/win/buddyicons.adp?aolp=0]. To receive an icon, the recipient has to select a specific option to accept Buddy Icons from their Buddy's. *Id.*

If a recipient of an IM does not want to receive messages from a particular user, they can set up AIM to show a "knock-knock" message for people not on their Buddy List. [http://www.aim.com/help_faq/security/faq.adp?aolp=0]. This allows a user to choose whether or not to accept messages from people who you may not know or do not trust. *Id.* If the user does not wish to receive further messages from a particular screen name, the particular screen name can be permanently blocked right from the IM form. *Id.* Alternatively, a user can Warn the other person. *Id.* When a user issues a warning to another AIM user, the recipient's warning level increases and that user's ability to send and receive messages decreases. *Id.* With enough warnings, the user can be prevented from exchanging any messages with anyone and may even be signed

contained the words "Kill Mr. VanderMolen," matching the name of a teacher at the District.

Aaron's Buddy Icon was created using his mother's personal computer at his mother's house. *See* n. 1, *supra*. Transmitting the Buddy Icon from Aaron to another person on his Buddy List was the modern-day equivalent of placing a telephone call, albeit with the added benefit of a caller-ID feature to determine who was "calling." Aaron had to select the IM addressee, and that person had to accept both the IM and the Buddy Icon.

The Buddy Icon in question was a crude stick drawing of a pistol and head, with the words "Kill Mr. VanderMolen" written underneath. Aaron created the Buddy Icon as a joke among a small group of his friends with whom he communicated, using the IM feature.[2] It is undisputed that Aaron did not send the icon to Mr. VanderMolen, nor did he ever intend to. The Buddy Icon was meant only as a private (although ill advised and sophomoric) joke among Aaron's friends.

---

off. *Id.* Users can also select to receive IM's only from those on their Buddy List, which will prevent users who are not on the user's Buddy List from detecting whether or not they are signed into AIM. *Id.* AIM provides many features to protect a user's privacy when signed in, to include controlling who can see the user online, blocking IM's, and ignoring chat from someone in a chat room. *Id.*

[2] Aaron never "circulated" the Buddy Icon at issue over the internet. As noted above, however, the Buddy Icon only appeared when Aaron and someone else were in a private IM conversation. Even then, the other participant in the conversation had to choose to receive the Buddy Icon. The Buddy Icon was not, as suggested by the courts below, published to a wide and diverse audience.

Aaron only shared the Buddy Icon with his friends, none of whom ever perceived it to be a realistic threat to Mr. VanderMolen or anyone else at the District. However, Chad McDeid ("McDeid"), another student at the District who had *not* been the recipient of Aaron's IM's, saw the Buddy Icon on the screen at the home of another student who was an intended recipient. McDeid asked that student to forward him a copy of the Buddy Icon. McDeid and Aaron did not like each other. In fact, they had a fight in the spring of 2001. McDeid saw the Buddy Icon in March 2001 while at another student's house who conversed with Aaron via AIM. McDeid did not interpret it to be a threat at that time, and he did nothing about it after he saw it. However, after his fight with Aaron, he changed his mind and concluded that the icon was now sinister.[3]

On April 25, 2001, McDeid sent an e-mail to Mr. VanderMolen telling him about the Buddy Icon and offering to get him a copy. McDeid could not access the Buddy Icon, because Aaron did not communicate with him via IM. Instead, he had to lie to another student to get a copy to give to the District, proving that Aaron's Buddy Icon was not accessible to the general public.

The next morning, Mr. VanderMolen told the High School Principal, Barry Copeland ("Copeland"),

---

[3] McDeid initially testified that he first saw the Buddy Icon while his brother was speaking with Aaron via IM, and it alarmed him, so he advised Mr. VanderMolen of its existence. He claimed he deleted it because he did not want it on his computer. However, he soon admitted that he saw it weeks earlier and thought nothing of it. Moreover, after he assumed his informant role, he kept the Buddy Icon on his computer for months, saving it to a desktop file.

about McDeid's e-mail. Copeland asked McDeid if the e-mail was "legit," but did nothing to restrict Aaron's movement about the building. Copeland did not ask McDeid anything else and he did not speak to Aaron. Instead, Aaron was free to go about his day while Copeland went to meet the defendant Superintendent of Schools, Richard Mabbett ("Mabbett") and the Middle School Principal, Linda Rice ("Rice"), at a breakfast being held several miles away. At that breakfast, Copeland showed McDeid's e-mail to Mabbett, who then gave it to an officer from the Sheriff's Department, who was also at the breakfast. That officer promised to investigate the matter, but no immediate action was taken.

After breakfast, Mabbett and Rice returned to the District and called Aaron from his class for gifted and talented students to an empty classroom. They did not show him the icon or ask him any direct question about it; nor did they ask Aaron anything about Mr. VanderMolen. Instead, they asked Aaron a few nebulous questions, such as whether he "had any issues with anyone in the building," or if he had anything that could hurt someone. Not surprisingly, Aaron had no idea what they were talking about with such obfuscatory questions, and he denied problems with anyone or possessing any weapon. In addition, Mabbet and Rice searched Aaron's backpack and locker, but founding nothing

After this odd meeting, Mabbett and Rice released Aaron to go about his day without restriction. Next, they briefly spoke with McDeid, who lied and said that he first saw the Buddy Icon the previous night. McDeid was not asked any questions about his relationship with Aaron, nor whether Aaron had ever said anything that directly

threatened Mr. VanderMolen, nor any other relevant questions.

Finally, Mabett and Rice spoke with another classmate of Aaron's, Timothy Church ("Church"). Church told them the Buddy Icon "probably was a joke and that [he] didn't know why [Aaron] would do that because [he knew] Aaron [wasn't] like that." Mabbett and Rice made Church prepare a statement to sign, which stated that Aaron thought the Buddy Icon was funny. The interview with Church concluded the District's investigation, and Mabbett testified that he had made up his mind to punish Aaron that day. This was before he received any information from the police and before he asked Aaron about the icon.

A representative from the local Sheriff's Department, Investigator Cornelius ("Cornelius"), investigated the matter to determine if there was any criminal liability. Cornelius reviewed the Buddy Icon and Church's statement, and interviewed Aaron and his parents. He concluded that the Buddy Icon was not a threat, and so advised Mabbett within one day. He confirmed his conclusions in an Incident Report, which he also provided to Mabbett. Despite professed concern for VanderMolen's anxiety level and state of mind, neither Mabbett nor anyone else at the District ever shared this information with VanderMolen.

In their rush to judgment, the District and its agents disregarded Cornelius' evaluation and conclusions. They also ignored the context in which the Buddy Icon was created, and displayed almost total ignorance of the technology of using a Buddy Icon on AIM. Most important, the District failed to perform any type of threat assessment regarding

Aaron. This omission was exacerbated by the fact that they also ignored Cornelius' threat assessments and, as discussed below, the assessment performed by a clinical psychologist hired by the Wisniewskis. No District administrator had ever received any training in threat assessment, and they did not consider any of the guidelines or procedures provided by the FBI or the Secret Service or in other materials available to school districts.[4]

Mabbett refused Appellant's request to have the school psychologist assess Aaron. Also, he did not refer Aaron to the Committee on Special Education, as he was obligated to do if he suspected an emotional disability. In light of this refusal, the Wisniewskis hired Norman Lesswing, Ph.D., a clinical psychologist in private practice who is an expert in the area of threat assessment, to assess Aaron. Dr. Lesswing reviewed the Buddy Icon, interviewed Aaron, his parents and several of Aaron's friends. He concluded that Aaron did not pose a threat to anyone and did not intend the Buddy Icon to be a threat.

Despite the fact that two separate threat assessments concluded that Aaron did not intend the

---

[4] The District purported to have a verbal zero tolerance policy to treat any statement that could possibly constitute a threat as a real threat, regardless of intent, content or assessment. They assert that Rice gave an oral presentation of this policy to Aaron's class. First of all, as discussed in detail below, such a policy is *per se* illegal. Secondly, it contravenes the District's written policy on the matter, which requires District personnel to conduct a threat assessment. Third, and more importantly, such a presentation does not constitute adequate notice of school policy designed to give a student fair warning of what speech is protected or not.

Buddy Icon as a threat, the District punished him for the simple act of creating it. Initially, the District suspended him for five days without allowing him the protections mandated by statute in connection with that suspension. Specifically, it did not provide Aaron with (1) a conference with the principal before the suspension; or (2) an opportunity to question District witnesses. *See* Education Law § 3214(3)(b)(1); 8 NYCRR § 100.2(l)(4). In fact, Mabbett told Rice that her letter of suspension to the Wisniewskis violated the New York regulations. Nevertheless, the process continued forward.

After the initial five-day suspension, the District readmitted Aaron, pending a superintendent's hearing, a necessary step under New York law before there could be a long-term suspension. Aaron was free to come and go as he wished, and the District did not monitor his behavior or limit his movements. This failure to control or otherwise monitor Aaron's movement about the school belies the District's assertions that they considered him to be an actual threat against the life of a teacher.

Prior to the Superintendent's Hearing, the District offered Aaron a 30-day suspension if he and his parents would release all claims against the School District.[5] This offer was rejected, and the

---

[5] FRE 408 addresses the admissibility of evidence concerning settlement negotiations/offers and provides that such evidence is not admissible to prove liability for a claim. This rule does not require exclusion when the evidence is offered for another purpose, such as proving "retaliatory purpose" or "improper motive. *See, e.g., Resolution Trust Corp. v. Blasdell*, 154 F.R.D 675 (D. Ariz. 1993).

Superintendent's Hearing was held on May 29, 2001. On June 6, 2001, Hearing Officer Lynda VanCoske recommended a full semester suspension. VanCoske's decision was devoid of any analysis as to whether Aaron's speech was protected by the First Amendment or whether the District had appropriate jurisdiction over the speech. Rather, she simply concluded that the Buddy Icon was a "threat," without any First Amendment analysis whatsoever.

Following the hearing, the offer of a 30-day suspension in exchange for a release was renewed with some modifications, but the Wisniewskis again rejected the offer. As a penalty for doing so, the Board of Education, which had approved the offer of a 30-day suspension, ordered a full-semester suspension. In a § 3214 proceeding, a board of education has an obligation to impose a suspension that is appropriate in light of the student's misconduct and prior disciplinary record. *See* N.Y. Education Law § 3214(3); *Appeal of Ruth Bowen,* 35 Ed. Dept. Rep. 136 (1995). The length of a suspension cannot be dependent on whether a student agrees to waive his fundamental rights. The imposition of a full-semester suspension amounted to nothing more than retaliatory and unconstitutional punishment for failing to agree to a release.

Aaron returned to classes when school opened in the fall of 2001 and was again allowed unfettered movement within the building. Then, on September 26, 2001, some four months after VanCoske's decision, Aaron's suspension commenced. He was suspended even though he was doing well at school with no problems of any kind. In fact, he had even been appointed a captain of the football team.

Aaron returned to school for the spring 2002 semester. He was greeted with systemic hostility and verbal abuse by certain staff members and other students. This on-going environment of hostility eventually forced Aaron's mother to sell their house and relocate to another school district where Aaron could have a fresh start.

Aaron thereafter initiated this lawsuit alleging a § 1983 violation of his First Amendment rights and pendent State claims. The defendants brought a motion for summary judgment alleging that Aaron's Buddy Icon was not protected speech because it constituted a "true threat" and also, that the Superintendent's hearing had issue preclusive effect on Aaron's First Amendment rights. The District Court agreed and granted the motion finding first in favor of the collateral estoppel defense and secondarily stating that the Buddy Icon was a true threat on the life of a teacher.

Having held that the Buddy Icon was a true threat, the lower court did not reach the next step in the analysis: whether Aaron's speech caused such a material and substantial disruption at the school so as to render it outside the protection of the First Amendment. *See, e.g., Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969) (for "school officials to justify a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpleasant viewpoint."); *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Penn. 2001) (where the school failed to make a showing that a "top ten" list about the school's athletic director, sent from a student to other

students via e-mail, both off-campus and after school hours, would "substantially disrupt school operations or interfere with the rights of others" as required by *Tinker*); *Emmet v. Kent School District No. 415*, 92 F.Supp.2d 1088 (W.D. Wash. 2000) (a student's website, created off campus but intended to be viewed by the school's students, depicted mock obituaries of teachers, including a feature that allowed visitors to vote on which teacher would be the next to "die," but was found to be "entirely outside of the school's supervision or control").

Indeed, since the motion for summary judgment did not raise a *Tinker* issue, nor did the District court decision find one, that issue was not briefed or responded to at either the District or Appellate court levels. Therefore, Petitioner has never had the opportunity to fully brief the *Tinker* case and its progeny vis-à-vis the facts of this action. At the District Court, the Petitioner, at most, was forced to respond to a motion for summary judgment concerning the preclusive effect of an informal school administrative proceeding, and whether or not Aaron's Buddy Icon was a true threat not entitled to First Amendment protection. Through counsel, Aaron answered only those arguments which were raised in the motion for summary judgment, in which the particular issue of whether the Defendant school district could punish speech occurring off campus was never reached, as the District's basis for punishment was that the speech was a true threat. Indeed, the District Court determined, in a content-central analysis, that Aaron's Buddy Icon was a true threat on the life of a teacher, and as such, it did not matter that it occurred off campus and after school hours. On appeal, counsel had no choice but to

examine the explicit decision of the Court below and not venture into areas expressly passed upon by it, including, once again, the *Tinker* case.

It is a bedrock principal of American law that a party is entitled to be heard on an issue before that issue can be ruled upon. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (a federal appellate court should not consider an issue not passed upon below, as the opportunity for the petitioning party to be heard is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence"). In the case at bar, the Petitioner has not been afforded an adequate opportunity to brief or explore, under *Tinker* and *Morse*, whether the District could justifiably punish a student for conduct occurring wholly off campus. *Morse v. Frederick,* 127 S. Ct. 2618 (U.S. June 25, 2007). Here, the Second Circuit jettisoned the District court's content-based analysis of finding a "true threat," in exchange for a content-neutral analysis based on a finding of "substantial disruption," where content did not matter, but instead, the District's subjective response was the determining factor for speech determined not to be a true threat, but just speech that was "disruptive."

REASONS FOR GRANTING THE PETITION

This case presents two exceptionally important questions of Constitutional law that have not been, but should be settled by this Court, and on which the circuits appear to be developing conflicting

opinions: first, may a public school district lawfully punish a student for engaging in a private conversation, off of school grounds and not at an event bearing the imprimatur of the district, merely because the subject matter of the speech relates to the district; and if so, may such a school district use its own internal policy to "take all threats seriously" to manufacture a subjective "substantial disruption" where none otherwise existed.

This Court should grant the Petition at bar to resolve the growing conflict in the circuits, and to eliminate the ongoing uncertainty as to the First Amendment protection afforded to off-campus student speech. In an increasingly digital world, Courts need guidance as to where to draw the line as to punishing students for fundamentally private speech that occurs in a off-campus setting and transmitted digitally.

I. Before Engaging in the *Tinker* Analysis, Courts Must First Answer the Jurisdictional Question as to Whether a Sufficient Nexus Between the Speech and the School District Exists

This Court "has repeatedly emphasized the need for affirming the comprehensive authority ... of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). On the other hand, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. In expanding on this basic

framework, the Second Circuit has previously held that:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.

Thomas v. Board of Education, 607 F.2d 1043, 1052 (2d Cir. 1979).

In cases subsequent to *Tinker*, this Court has added that a school may prohibit lewd, vulgar or profane language on school property. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). Furthermore, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). These cases cover situations involving speech at a student assembly and speech in the school newspaper, both of which bear the imprimatur of the school district. Most recently, this Court was explicit is stating "there is some uncertainty at the outer boundaries as to when courts should apply [the *Tinker* standard to off-campus speech]." *See Morse*,

127 S.Ct. at 2624, *citing Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, n. 22 (5th Cir. 2004). It is on this outer boundary where the current case resides – not at a school assembly and not in the school newspaper. As this Court stated in *Tinker*, 393 U.S. at 511:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligation to the State.

When analyzing cases like *Bethel* and *Hazlewood*, it becomes absolutely clear that Aaron's speech in the case at bar was of an entirely different nature, as it occurred entirely off-campus. *See Killion v. Franklin Regional School Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (school could not punish student for list disparaging athletic director); *Flaherty v. Keystone Oaks School Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003) (school could not punish student for "trash talk" about volleyball game); *Latour v. Riverside Beaver Sch. Dist.*, No. 05-1076, 2005 U.S. Dist. LEXIS 35919, (W.D. Pa. Aug. 24, 2005) (enjoining school from punishing student for rap song lyrics). Thus, the district courts in the Third Circuit appear to be interpreting *Morse* to recognize that off-campus[6] speech, <u>not</u> related to any

---

[6] *See Beussink v. Woodland School District*, 30 F. Supp.2d 1175, 1180 n. 4 (E.D. Mo. 1998) In determining whether the *Hazelwood* or *Tinker* standard should apply to a Web site, the court stated that "Student personal expressions which happen to take place on school property are different from school-

district function, is outside "the far reaches of what the First Amendment permits." *See also Beussink v. Woodland School District*, 30 F.Supp.2d 1175, 1180 (E.D.Mo. 1998) (punishment of a student disciplined for an article posted on personal website was enjoined because of likelihood of successful First Amendment claim, even though evidence established that the site was accessed at school); *Klein v. Smith*, 635 F.Supp. 1440, 1441-42 (D.Me. 1986) (suspension of a student who made a vulgar gesture to a teacher while off campus was enjoined).

In *Morse*, this Court recited a litany of contextual factors in determining that the speech was school-related, and as such, reviewable from the *Tinker* standpoint. Specifically, the speech in *Morse* occurred during normal school hours at a sanctioned school event, in the presence of teachers and administrators charged with supervising students. In addition, the school band and cheerleaders performed, and the message on the banner was directed at the student body. Because these factors were present to establish a nexus, this Court was free to analyze the content of the speech vis-à-vis the educational mission of the school. None of these factors, used to create the initial nexus to the school district that brought *Tinker* into consideration, are present in the case at bar.

In the present case, there was no nexus between Aaron's Buddy Icon and the District other

---

sponsored speech and continue to be governed by the standard set forth in *Tinker*." Thus, the Court considered the speech to be on school property by virtue of the student accessing it on the website at school. Here, however, there was no access to the Buddy Icon at school in any form. It was not on campus speech.

than its content. If the content of the Buddy Icon was a true threat, as the District Court erroneously concluded, the District need not determine whether there was a nexus or a substantial disruption under *Tinker*. However, if there is no showing that Aaron's Buddy Icon was a true threat, as the Second Circuit held, the nexus to the District no longer exists.

Aaron's IM, unlike the aforementioned cases, was akin to a private communication between two people. Aaron was merely on his parent's computer sending a private text message to his friends, an act for which there was no reasonable or likely nexus to the District. *See Thomas*, 607 F.2d 1043 (a sexually explicit magazine, composition of which occurred after school hours in a classroom, represented a "*de minimis*" nexus to the school "because school officials ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."). The *Thomas* Court was clearly disturbed by the fact that suspension letter sent to parents clearly indicated that the discipline was premised on acts which occurred wholly off-campus. *Id.* In the case at bar, Aaron was punished by the District for events that occurred entirely off-campus with no reasonable nexus or connection to the District whatsoever.

On the basis of the foregoing, the weight of authority suggests that school districts may only engage in the *Tinker* analysis, and the search for a "substantial disruption" that flows from the speech, after the threshold jurisdictional question is answered: is there a sufficient nexus between the speech and the school district to justify punishing the

student. Regardless of whether the source of the school's authority is based on timing, function, context or interference with its operations, it is incumbent upon the school to establish that it had the authority to punish the student by showing an appropriate nexus between the speech and school. Where, as here, the speech is private and occurs entirely off-campus, school districts may not punish students for their speech unless they can clearly demonstrate that the speech is aimed at the school or is inherently unconstitutional (e.g., a true threat or incitement).

Prior to the Second Circuit's decision, the nexus to the District, presumably, had always been the erroneous conclusion that Aaron's Buddy Icon was a "true threat." In essence, the Second Circuit decided that it need not answer the threshold jurisdictional question. If the Second Circuit is correct, and there is no need to analyze whether Aaron's Buddy Icon was, in fact, a true threat, then no causal nexus exists between Aaron's off-campus conduct and the irrational reaction of the District. Indeed, the school suspended Aaron because they believed that he had threatened the life of a teacher, and the District Court granted summary judgment on that basis, but if the speech was not a true threat, then the District's reaction must have been irrational.

If anything can be gleaned from *Morse*, it is the principle that school officials do not have unfettered latitude to censor student speech under the rubric of "interference with the educational mission," as that term can be easily manipulated with a subjective interpretation. Thus, while a school may categorically punish speech that is lewd,

profane and sexually inappropriate on school grounds under *Fraser*, such authority does not extend to give the school authority the right to punish a student for creating the same speech off campus. In the case at bar, the Second Circuit should have concluded that, construing the evidence in a light most favorable to Aaron, a sufficient causal nexus between Aaron's speech and a substantial disruption of the school environment could not have been established. There are several gaps in the causal link between Aarons' off-campus conduct and any material and substantial disruption of operations in the school. Most notably, the District is unable to connect the alleged disruption, if any, to Aaron's direct conduct. Moreover, the District has not demonstrated that the discussions or reaction to the Buddy Icon and text message were caused by Aaron, as opposed to the reaction of the administrators themselves. *See Latour v. Riverside Beaver Sch. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa., Aug. 24, 2005) (distinguishing between a disruption caused by a student's lyrics and that caused by student reaction to the administrators' behavior).

The Second Circuit looked only to the content of the Buddy Icon to determine that a substantial interference with the District was reasonably foreseeable. They did so without ever concluding that the District had the authority to punish Aaron because there existed no nexus between the speech and District. Thus, the Court below, citing *Morse*, stated:

> The fact that Aaron's creation and transmission of the IM icon occurred away from school property does not

> necessarily insulate him from school discipline.... [I]t was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot... and the risk of substantial disruption is not only reasonable, but clear. These consequences permit school discipline, whether or not Aaron intended his IM icon to be communicated to school authorities or, if communicated, to cause a substantial disruption. As in [the Bong Hits 4 Jesus ruling], the student in the pending case was not disciplined for conduct that was merely "offensive," or merely in conflict with some view of the school's "educational mission."

This Court ruled that holding a banner with the phrase "Bong Hits 4 Jesus," even if it took place off-campus and was done as a joke, undermined the school's anti-drug policies, particularly since the event in question was school-sanctioned. Here, that nexus does not exist, and as such, the District had no authority to punish Aaron for engaging in his speech.

If the Second Circuit's decision is allowed to stand as is, then *Tinker* has been substantively overruled. If a school district can punish a student for engaging in an off-campus private communication with a friend, outside of any school-sanctioned event or school policy, then *Tinker's* promise of preserving the constitutionality of student speech has been eviscerated. With the gaping sanction of school authority granted by the Second Circuit in the case at bar, it appears that at least one Circuit is willing to agree with Justice Thomas' concurring opinion in

Morse, where he stated that *Tinker* should just be overruled. If *Tinker* is to be overruled, then it must be done by this High Court, and not be one circuit; and conversely, if *Tinker* remains the law of the land, then this Circuit court decision can not stand as is.

II. A Policy to "Take All Threats Seriously" Merely Operates as a De Facto Prior Restraint on Constitutionally Protected Student Speech

In the instant case, the only disruption established by the District was that which they created on their own as a result of their impermissibly broad warning that "all threats would be taken seriously." The Second Circuit's determination that Aaron's Buddy Icon materially and substantially disrupted the work and discipline of the school is belied by the actual facts of the case, which, taken in a light most favorable to Aaron, show that the District failed to take any immediate or substantial action as a result of the Buddy Icon. In *Thomas*, the Second Circuit deemed far more substantial on-campus activity, to include generation and dissemination of the message on campus, to be "de minimis." Indeed, Justice Black in *Tinker* described a far more boisterous and hostile environment sparked by the children wearing anti-Vietnam war armbands, which still did not give school officials a reasonable fear of disturbance sufficient to overcome their right to freedom of expression. 393 U.S. at 517-18 (Black, J., dissenting).

The Seventh Circuit has held that a school district's rules or policies prohibiting the distribution of literature that was likely "to produce a significant

disruption of the normal educational processes, functions or purposes" were both vague and overbroad because "it did not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited". *Jacobs v. Board of School Com'rs,* 490 F.2d 601, 604-05 (7th Cir. 1973), *vacated as moot* 420 U.S. 128 (1975). The Fourth Circuit, after this Court's vacation of *Jacobs*, later adopted this same approach. *Nitzberg v. Parks,* 525 F.2d 378 (4th Cir. 1975).

The District's verbal policy, which they repeatedly affirm Aaron was aware of and, therefore, should have known his speech would cause a disruption, was nothing more than an attempt to create a *de facto* prior restraint for *any* speech which they deemed to be threatening. This Court has recently recognized that:

> The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 796, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984). The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial

invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," *id.*, at 613, 37 L Ed 2d 830, 93 S Ct 2908. See also *Virginia v. Black,* 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536 (2003); *New York* v. *Ferber*, 458 U.S. 747, 769, n. 24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982); *Dombrowski* v. *Pfister*, 380 U.S. 479, 491, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965).

We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes criminal sanctions. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 634, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980); *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977); *NAACP* v. *Button*, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963). Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, *Dombrowski*, *supra*, at 486-487, 14 L Ed 2d 22, 85 S Ct 1116--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social

> costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113 (2003).

First Amendment challenges based on overbreadth are prototypical exceptions to the traditional rule "at least when statutes regulate or proscribe speech" because "the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999), *citing Gooding v. Wilson,* 405 U.S. 518, 520-21 (1972).

In the case at bar, the District has determined that any threatening language will be "taken seriously." The District, however, has never defined what constitutes a threat under the policy, nor have students been given any reasonable indicia of what the District may consider to be threatening. Thus, the District, in utilizing this policy, may exercise standardless discretion with regard to student speech. Following this unwritten policy to its logical extreme, every incident which the District deems to be threatening will also be punishable under the *Tinker* standard because they are allowed to manufacture the disruption on their own. *See Latour v. Riverside Beaver Sch. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa., Aug. 24, 2005) (distinguishing between a disruption caused by a student's lyrics and that caused by student reaction to the administrators' behavior). Under this scenario, any potentially threatening student speech, even if

constitutionally permissible, is permissible only as long as the District elects not to react "seriously." This has a very real effect of chilling otherwise permissible student speech because anything perceived to be a threat necessarily creates the requisite substantial disruption envisioned by *Tinker*.

In the instant case, the only disruption established by the District was that which they created on their own as a result of their impermissibly broad warning that "all threats would be taken seriously." However, based on an unwritten, overbroad regulation to take all threats seriously, the District manufactured disruption by its own acts. A policy meant to manufacture such disruption is likely to have a serious chilling effect on student speech, including speech which occurs entirely off-campus and outside the jurisdictional reach of the District. As such, the policy should be struck down as overbroad and impermissibly impinging on student speech.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court grant the Petition and that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit in order that this Court may review and reverse the judgment in this case.

THIS PAGE
INTENTIONALLY
LEFT BLANK

06-3394-cv
Wisniewski v. Bd. of Ed. of Weedsport Central School Dist.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2006

Heard: April 17, 2007 Decided: July 5, 2007)

Docket No. 06-3394-cv

- - - - - - - - - - - - - - - - - -

MARTIN WISNIEWSKI and
ANNETTE WISNIEWSKI, on behalf
of their son Aaron Wisniewski,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE
WEEDSPORT CENTRAL SCHOOL
DISTRICT and RICHARD MABBETT,
Superintendent of Schools,
Defendants-Appellees.

- - - - - - - - - - - - - - - - - -

Before: NEWMAN, WALKER, and STRAUB, Circuit Judges.

Appeal from the June 30, 2006, amended judgment of the United States District Court for the Northern District of New York (Norman A. Mordue,

Chief Judge), granting summary judgment on federal law claims to school board and school superintendent sued for suspending student for displaying via Internet instant messaging an icon depicting the shooting of a named teacher, and declining to exercise supplemental jurisdiction over state law claims.

Affirmed.

Stephen Ciotoli, Fayetteville, N.Y. (Dennis G. O'Hara, O'Hara, O'Connell & Ciotoli, Fayetteville, N.Y., on the brief), for Plaintiffs-Appellants.

Suzanne O. Galbato, Syracuse, N.Y. (Jonathan B. Fellows, Bond, Schoeneck & King, Syracuse, N.Y., on the brief), for Defendants-Appellees.

JON O. NEWMAN, Circuit Judge.

This appeal concerns a First Amendment challenge to an eighth-grade student's suspension for sharing with friends via the Internet a small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed. Plaintiffs-Appellants Martin and Annette Wisniewski, the parents of Aaron Wisniewski, appeal from the June 30, 2006, amended judgment of the District Court for the Northern District of New York (Norman A. Mordue, Chief Judge), dismissing their federal civil rights claims against the Defendants-Appellees Weedsport Central School District Board of Education and School Superintendent Richard

Mabbett and declining to exercise supplemental jurisdiction over state law claims. We conclude that the federal claims were properly dismissed because it was reasonably foreseeable that Wisniewski's communication would cause a disruption within the school environment, and that it was appropriate not to exercise supplemental jurisdiction. We therefore affirm.

Background

Facts of the episode. This case arose out of an Internet transmission by an eighth-grader at Weedsport Middle School, in the Weedsport Central School District in upstate New York. In April 2001, the pupil, Aaron Wisniewski ("Aaron"), was using AOL Instant Messaging ("IM") software on his parents' home computer. Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called "buddies" in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a "buddy list" who happen to be on-line at the same time. Different IM programs use different notations for indicating which members of a user's "buddy list" are on-line at any one time. Text sent to and from a "buddy" remains on the computer screen during the entire exchange of messages between any two users of the IM program.

The AOL IM program, like many others, permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name. The IM icon of the

sender and that of the person replying remain on the screen during the exchange of text messages between the two "buddies," and each can copy the icon of the other and transmit it to any other "buddy" during an IM exchange.

Aaron's IM icon was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood.[1] Beneath the drawing appeared the words "Kill Mr. VanderMolen." Philip VanderMolen was Aaron's English teacher at the time. Aaron created the icon a couple of weeks after his class was instructed that threats would not be tolerated by the school, and would be treated as acts of violence. Aaron sent IM messages, displaying the icon to some 15 members of his IM "buddy list." The icon was not sent to VanderMolen or any other school official.

The icon was available for viewing by Aaron's "buddies" for three weeks, at least some of whom were Aaron's classmates at Weedsport Middle School. During that period it came to the attention of another classmate, who informed VanderMolen of Aaron's icon and later supplied him with a copy of the icon. VanderMolen, distressed by this information, forwarded it to the high school and middle school principals, who brought the matter to the attention of the local police, the Superintendent Mabbett, and Aaron's parents. In response to questioning by the school principals, Aaron acknowledged that he had created and sent it and expressed regret. He was then suspended for five days, after which he was allowed back in school,

---

[1]The Appellants, in something of an understatement, describe Aaron's icon as "distasteful." See Brief for Appellants at 3 n.1.

pending a superintendent's hearing. VanderMolen asked and was allowed to stop teaching Aaron's class.

At the same time, a police investigator who interviewed Aaron concluded that the icon was meant as a joke, that Aaron fully understood the severity of what he had done, and that Aaron posed no real threat to VanderMolen or to any other school official. A pending criminal case was then closed. Aaron was also evaluated by a psychologist, who also found that Aaron had no violent intent, posed no actual threat, and made the icon as a joke.

The superintendent's hearing. In May 2001 a superintendent's hearing, regarding a proposed long-term suspension of Aaron, was held before a designated hearing officer, attorney Lynda M. VanCoske. Aaron was charged under New York Education Law §3214(3) with endangering the health and welfare of other students and staff at the school.

In her decision of June 2001, VanCoske found that the icon was threatening and should not have been understood as a joke. Although the threatening act took place outside of school, she concluded that it was in violation of school rules and disrupted school operations by requiring special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time. The hearing officer acknowledged the opinions of the police investigator and the psychologist that Aaron did not intend to harm VanderMolen and that he did not pose any real threat, but stated that "intent [is] irrelevant." Citing the evidentiary standard followed in New York suspension hearings, the decision concluded:

> Substantial and competent evidence exists that Aaron engaged in the act of sending a threatening message to his buddies, the subject of which was a teacher. He admitted it. Competent and substantial evidence exists that this message disrupted the educational environment....
>
> As a result of the foregoing, I conclude that Aaron did commit the act of threatening a teacher, in violation of page 11 of the student handbook, creating an environment threatening the health, safety and welfare of others, and his actions created a disruption in the school environment.

The hearing officer recommended suspension of Aaron for one semester. The recommendation was presented to the district's Board of Education ("Board"),[2] which approved the one semester suspension in late September 2001. Aaron was suspended for the first semester of the 2001-2002 school year. During the period of suspension the school district afforded Aaron alternative education. He returned to school for the spring term. At oral argument, we were advised that because of school and community hostility, the family moved from Weedsport.

The District Court litigation. In November 2002 Aaron's parents filed on his behalf the current suit against the Board and Superintendent Mabbett,

---

[2] Although Superintendent Mabbett was authorized under the statute to decide Aaron's discipline, the issue was brought before the Board due to his prior involvement in the case.

seeking damages under 42 U.S.C. § 1983. The complaint included five counts: the first count claimed that Aaron's icon was not a "true threat," but was protected speech under the First Amendment. It therefore alleged that in suspending Aaron the Board acted in a retaliatory manner in violation of his First Amendment rights. The second and third counts alleged that the Board and Mabbett, respectively, had failed to train school staff in threat assessment, thereby leading to the violation of Aaron's First Amendment rights. The fourth and fifth counts claimed the Board had violated New York State Education Law.

In June 2006, Chief Judge Mordue granted the Defendants' motion for summary judgment. The District Court first found that the hearing officer had made a factual determination, entitled to preclusive effect, that the icon was a threat and, as such, not protected by the First Amendment. Alternatively, the Court made its own determination that the icon was reasonably to be understood as a "true threat" lacking First Amendment protection. The Court also found that, in any event, Mabbett would be entitled to qualified immunity. Having dismissed all three federal law claims, the District Court declined to exercise supplemental jurisdiction over the remaining two state law claims, and dismissed them without prejudice.

Discussion

We see no need to resolve the dispute between the parties as to whether the Plaintiffs' claim was barred by collateral estoppel arising from the determinations in the Superintendent's hearing.

Instead, we turn directly to the merits of the Plaintiffs' claim that Aaron's icon was protected speech under the First Amendment.

In assessing that claim, we do not pause to resolve the parties' dispute as to whether transmission of the icon constituted a "true 'threat'" within the meaning of the Supreme Court's decision in Watts v. United States, 394 U.S. 705, 708 (1969). Watts concerned a criminal prosecution for violating 18 U.S.C. § 871(a), which provides punishment for "knowingly and willfully... mak[ing] [a] threat against the President." The defendant had said at a public rally on the grounds of the Washington Monument, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Id. at 706. The Court noted that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind," and added, "What is a threat must be distinguished from what is constitutionally protected speech." Id. at 707 (emphasis added). Ruling that "the statute initially requires the Government to prove a true 'threat,'" the Court concluded, "We do not believe that the kind of political hyperbole indulged in by [the defendant] fits within that statutory term." Id. at 708.

Although some courts have assessed a student's statements concerning the killing of a school official or a fellow student against the "true 'threat'" standard of Watts, see, e.g., Doe v. Pulaski County Special School District, 306 F.3d 616, 621-27, 627-32 (8th Cir. 2002) (in banc); Lovell v. Poway Unified School District, 90 F.3d 367, 371-73 (9th Cir. 1996), we think that school officials have

significantly broader authority to sanction student speech than the Watts standard allows. With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Tinker, it will be recalled, concerned students (two at a high school and one at a junior high school) suspended by school authorities for coming to school wearing black armbands signifying their opposition to the Vietnam War. See id. at 504. Noting that the students' conduct was "a silent, passive expression of opinion," id. at 508, the Court stated, "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. at 509. The Court used several formulations to describe student conduct that would merit school discipline: conduct that (1) "would substantially interfere with the work of the school," id., or (2) cause "material and substantial interference with schoolwork or discipline," id. at 511, or (3) "would materially and substantially disrupt the work and discipline of the school," id. at 513, or (4) "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," id. at 514. Seeing no evidence of any of such risks, the Court ruled that the students' wearing of the armbands was speech protected against school discipline by the First Amendment. See id. at 511-14.

In its most recent consideration of a First Amendment challenge to school discipline in response to a student's allegedly protected speech, the Supreme Court viewed the third formulation as Tinker's holding: "Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" Morse v. Frederick, No. 06-278, 2007 WL 1804317, at *7 (Sup. Ct. June 25, 2007) (quoting Tinker, 393 U.S. at 513).

Even if Aaron's transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of Tinker, we conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would "materially and substantially disrupt the work and discipline of the school." Id. (internal quotation marks omitted). For such conduct, Tinker affords no protection against school discipline. See LaVine v. Blaine School District, 257 F.3d 981, 989-92 (9th Cir. 2001) (upholding, under Tinker, suspension of high school student based in part on poem describing shooting of students); Boucher v. School Board, 134 F.3d 821, 827-28 (7th Cir. 1998) (upholding, under Tinker, one-year expulsion of high school student for writing article in underground newspaper outlining techniques for hacking into school computers); J.S., a Minor v. Bethlehem Area School District, 757 A.2d 412, 422 (Pa. Cmwlth. 2000) (upholding, under Tinker, permanent expulsion of student for placing

on web-site picture of severed head of teacher and soliciting funds for her execution).

The fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.[3] We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school, see Thomas v. Board of Education, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale."), as have other courts, see Pulaski, 306 F.3d at 62527 (letter, written and kept at home, that threatened killing of fellow student); Sullivan v. Houston Independent School District, 475 F.2d 1071, 1075-77 (5th Cir. 1973) (underground newspaper distributed off-campus but near school grounds); J.S., 757 A.2d at 418-22 (material created on home computer).

In this case, the panel is divided as to whether it must be shown that it was reasonably foreseeable that Aaron's IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability. We are in agreement, however, that, on the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher

---

[3] Since the Supreme Court in Morse rejected the claim that the student's location, standing across the street from the school at a school approved event with a banner visible to most students, was not "at school," Morse, 2007 WL 1804317, at *5, it had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities.

whom the icon depicted being shot.[4] The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.

Whether these aspects of reasonable foreseeability are considered issues of law or issues of fact as to which, on this record, no reasonable jury could disagree, foreseeability of both communication to school authorities, including the teacher, and the risk of substantial disruption is not only reasonable, but clear. These consequences permit school discipline, whether or not Aaron intended his IM icon to be communicated to school authorities or, if

---

[4] Judge Walker, who otherwise fully concurs in this opinion and in the judgment, would hold that a school may discipline a student for off-campus expression that is likely to cause a disruption on campus only if it was foreseeable to a reasonable adult, cognizant of the perspective of a student, that the expression might reach campus. Cf. Skoros v. City of New York, 437 F.3d 1, 23 (2d Cir. 2006) (discussing perspective of reasonable adult who assesses religious display aware that it will be seen primarily by children). He believes that to hold otherwise would run afoul of Thomas, 607 F.2d at 1045 (holding that "the arm of [school] authority does not [generally] reach beyond the schoolhouse gate"), and would raise substantial First Amendment concerns, as it might permit a school to punish a student for the content of speech the student could never have anticipated reaching the school, such as a draft letter concealed in his night-stand, stolen by another student, and delivered to school authorities, cf. Porter v. Ascension Parish School Board, 393 F.3d 608, 615 n.22 (5th Cir. 2004) ("[T]he fact that Adam's drawing was composed off-campus and remained off-campus for two years until it was unintentionally taken to school by his younger brother takes the present case outside the scope of [Tinker].").

communicated, to cause a substantial disruption. As in Morse, the student in the pending case was not disciplined for conduct that was merely "offensive," Morse, 2007 WL 1804317, at *10, or merely in conflict with some view of the school's "educational mission," id. at *18 (Alito, J., with whom Kennedy, J., joins, concurring).

Although the Appellants contend that the First Amendment barred the imposition of any discipline, they make no distinct challenge to the extent of the discipline. Thus, we need not determine whether such a challenge would have to be grounded on the First Amendment itself or the substantive component of the Due Process Clause of the Fourteenth Amendment. Cf. Graham v. Connor, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). And we are mindful that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." Wood v. Strickland, 420 U.S. 308, 326 (1975). However, in the absence of a properly presented challenge, we do not decide whether the length of the one semester suspension exceeded whatever constitutional limitation might exist. We rule only that the First Amendment claims against the School Board and the Superintendent were properly dismissed, and that the state law claims were properly left for whatever state court

adjudication might be available. We need not rule on the Superintendent's defense of qualified immunity.

Conclusion

The judgment of the District Court is affirmed.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

MANDATE

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of July, two thousand seven.

Before:
Hon. Jon O. Newman
Hon. John M. Walker, Jr.
Hon. Chester J. Straub
Circuit Judges

Docket No. 06-3394-cv

UNITED STATES
COURT OF APPEALS
FILED

JUL 05 2007

Catherine O'Hagan Wolfe,
Clerk
SECOND CIRCUIT

MARTIN WISNIEWSKI and ANNETTE WISNIEWSKI, on behalf of their son Aaron Wisniewski,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE WEEDSPORT CENTRAL SCHOOL DISTRICT and RICHARD MABBETT, Superintendent of Schools,

Defendants-Appellees.

Appeal from the amended judgment of the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is AFFIRMED in accordance with the opinion of this court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk by

s/ Arthur M Heller
Arthur M Heller
Motions Staff Attorney

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by s/ Angela Martin
DEPUTY CLERK

UNITED STATES
SECOND CIRCUIT
COURT OF APPEALS

Issued as Mandate: Jan 11 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARTIN and ANNETTE WISNIEWSKI, on behalf of their son Aaron Wisniewski,

Plaintiffs,

v. **5:02-CV-1403**

THE BOARD OF EDUCATION OF THE WEEDSPORT CENTRAL SCHOOL DISTRICT and RICHARD MABBETT, Superintendent of Schools,

Defendants.

APPEARANCES:
O'HARA & O'CONNELL
STEPHEN CIOTOLI, Esq., of Counsel
220 Salina Meadows Parkway
Suite 100
Syracuse, New York 13212-4505
Attorneys for Plaintiffs

BOND, SCHOENECK & KING, PLLC
JONATHAN B. FELLOWS, Esq., of Counsel
SUZANNE O. GALBATO, Esq., of Counsel
One Lincoln Center
Syracuse, New York 13202-1355
Attorneys for Defendants

Chief Judge Norman A. Mordue:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Presently before the Court is defendants' motion for summary judgment (Dkt. No. 38). Upon being charged with threatening a teacher, Aaron Wisniewski ("Aaron"), then a student at Weedsport Middle School, was afforded a Superintendent's Hearing pursuant to New York Education Law, § 3214(3)(c)(1). The Hearing Officer found that Aaron had circulated through the internet a threat to kill one of his teachers and recommended suspension for a semester. Defendant Board of Education of Weedsport Central School District ("Board") accepted the Hearing Officer's findings and imposed the recommended suspension. Plaintiffs claim that defendants' actions violated Aaron's rights under the First Amendment, 42 U.S.C. § 1983, and the New York Education Law.

For the reasons set forth below, the Court grants defendants' motion for summary judgment and dismisses the federal causes of action on the merits. The Court declines to retain jurisdiction over the state law claims and dismisses them without prejudice.

BACKGROUND

Facts

Unless otherwise indicated, the facts set forth in this section are undisputed based on the complaint, defendants' Statement of Material Facts, plaintiffs' response thereto, and the record.

In spring 2001, Aaron, who was 15 years old, was an eighth grade student at Weedsport Middle School ("School"), in the Weedsport Central School District ("District"). Aaron was present when, on March 29, 2001, School personnel visited his classroom to discuss school violence. They advised the students that all threats of violence would be taken seriously.

In early April 2001 Aaron created and attached to the instant messaging feature of his family computer an icon depicting a gun pointing to a head, a bullet leaving the gun, and blood splattering from the head. It bore the words "Kill Mr. VanderMolen." Mr. VanderMolen was Aaron's English teacher. Aaron attached the icon[1] to instant messages he forwarded from his home computer to about 15 friends, including classmates. He did not forward it to Mr. VanderMolen.

The icon circulated from Aaron's home computer to this group of friends for about three weeks. On April 25, 2001, another student, Chad McDeid ("Chad"), who had seen the icon, reported it to Mr. VanderMolen. The next day, Mr. VanderMolen viewed the icon and reported it to the District administration.

The following day, April 27, 2001, Linda Rice, the School Principal, and defendant Richard Mabbett, the District's Superintendent of Schools, met with Aaron and his parents. Also present was Lieutenant Lamphere from the Cayuga County Sheriff's Department, which the District had notified of the incident. At the meeting, Aaron acknowledged

---

[1] For simplicity, the Court refers to both the graphic (of the gun, bullet, head, and blood) and the accompanying words "Kill Mr. VanderMolen" as "the icon."

that he had created the icon. After the meeting, Principal Rice suspended Aaron from school for five days on the ground that he "made threatening icons and language directed towards a teacher over a home computer and sent it to several students."[2]

Administrative Proceeding

On April 30, 2001, the District sent plaintiffs notice of a Superintendent's Hearing pursuant to section 3214(3)(c)(1), charging Aaron with threatening Mr. VanderMolen on April 26, 2001, based on a threatening message sent through the internet to other students. On May 16, 2001, the Sheriff's Department determined that Aaron did not constitute a "realistic threat" to Mr. VanderMolen or other School officials and closed its investigation. Norman J. Lesswing, Ph.D., a psychologist retained by plaintiffs to provide a professional threat assessment, concluded that Aaron did not pose a threat to Mr. VanderMolen or other School officials.

The Superintendent's Hearing took place on May 29, 2001, before an attorney, Lynda VanCoske, Esq., whom the Board had designated as Hearing Officer. Aaron was represented by counsel, who cross-examined the District witnesses and called witnesses on Aaron's behalf. At the close of the

---

[2] Plaintiffs claim that prior to the five-day suspension, the District failed to provide either Aaron or his parents with the required notice, nor did it provide them with an informal conference with the principal or the right to ask questions of the complaining witnesses. See N.Y. Educ. Law § 3214(3)(b)(1). Plaintiffs also complain that Aaron was removed from the District's baseball team without a hearing. The reason given was his violation of the behavioral rules stated in the athletic handbook.

hearing, briefs were submitted to the Hearing Officer by counsel for Aaron and the District.

In its memorandum to the Hearing Officer, the District argued, *inter alia*, that the District treated the icon as a threat; that it was justified in doing so; that there was nothing about the icon that identified it as a joke or anything other than a serious statement; that the information possessed by the District did nothing to contradict the plain message of the icon; that the District's reaction was reasonable in light of the violence prevalent in schools today; that Aaron should have foreseen that his icon would be taken seriously as a threat; that a few days previously in a classroom presentation, School personnel had advised the students, including Aaron, that threats would be taken seriously; that Aaron was not discriminating about who received the icon and should not have been surprised that School officials learned of it; that it caused disruption in the School; and that Mr. VanderMolen felt threatened and did not take the icon as a joke. The District contended that the icon was a threat and thus not entitled to First Amendment protection. *See Watts v. United States*, 394 U.S. 705, 707 (1969).

Aaron's counsel submitted a memorandum to the Hearing Officer setting forth two basic contentions: (1) that under the circumstances no reasonable person could seriously consider Aaron's icon to be a real threat to kill Mr. VanderMolen; and (2) that it would be unconstitutional to discipline Aaron for the icon because it was protected by the First Amendment. Arguing that the icon was not a true threat and thus enjoyed First Amendment protection, counsel addressed the factors examined by courts in determining whether a statement is a

true threat, citing *Watts*, 394 U.S. at 707, and *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996). These factors include the context of the statement, its conditional nature, and the hearers' reactions. With respect to the context of the statement, counsel pointed to the following facts: there was no past conflict between Aaron and Mr. VanderMolen; Aaron's prior disciplinary record reflected only minor infractions; a search of Aaron's locker and backpack was negative; and Aaron did not communicate the threat to Mr. VanderMolen but circulated it outside of school among a group of friends. Counsel also refers to evidence that Aaron and at least one of his friends thought the icon was a joke.

On June 6, 2001, the Hearing Officer issued a recommendation which included the following findings:

> Aaron is unquestionably bright and articulate. His testimony that the icons and message were a joke was unconvincing, and he provided no explanation, justification for context for these icons being construed as jokes. Common sense dictates that without context or explanation, the threatening words such as "Kill Mr. VanderMolen" are not a joke. Mr. VanderMolen did not take these words as a joke. Mr. VanderMolen testified that he was scared, concerned, and felt sick to his stomach upon reading the message. Until the issue was resolved, he asked to be removed from teaching Aaron's class because he felt

> uncomfortable teaching the class and was concerned about his and his six month old child's safety. The District honored that request. Ms. Rice testified that Mr. VanderMolen appeared anxious and fearful.
>
> In addition, on approximately March 29, 2001, Ms. Rice, with the social worker and director of guidance, visited every class and spoke to students about the topic of threats. They advised students that any threats must be communicated to adults and that these threats will not be considered jokes. Aaron admits being present at that meeting. He heard Ms. Rice explain that threats were no joke, yet he still created the threat and icons after Ms. Rice's visit.

The Hearing Officer observed that student conduct occurring outside of school can properly be the subject of school discipline. She noted "the realities of school violence" and the legislative and administrative responsibilities placed on schools in the face of threats. She found that the District "had a legitimate concern and reason to believe these words and icons were anything but a joke." After setting forth the actions of the District in response to the threat, the Hearing Officer found that they were disruptions which justified disciplining Aaron in school.

The Hearing Officer also noted that the Sheriff's Department concluded that the icon was a joke, and that Dr. Lesswing concluded that Aaron

posed no actual threat and that the message was intended to stay in a social context. The Hearing Officer, however, stated that intent was "irrelevant." She found that "[s]ubstantial and competent evidence exists that Aaron engaged in the act of sending a threatening message to his buddies, the subject of which was a teacher" and concluded:

> As a result of the foregoing, I conclude Aaron did commit the act of threatening a teacher, in violation of page 11 of the student handbook, creating an environment threatening the health, safety and welfare of others, and his actions created disruption in the school environment.

She recommended that the District suspend Aaron for the first semester of the 2001-2002 school year.

The parties agreed that the Hearing Officer's recommendations would be considered by the Board rather than by defendant Superintendent Mabbett. On July 24, 2001, the Board met to consider the matter. It heard presentations from plaintiffs' attorney and the District's attorney.

The Board accepted the Hearing Officer's decision on September 24, 2001. Plaintiffs did not seek further review, although they were entitled to appeal by petition to the Commissioner of Education pursuant to New York Education Law § 310(7). The Commissioner's decision would then be subject to judicial review pursuant to Article 78 of New York's Civil Practice Law and Rules.

The District suspended Aaron from the first semester of the 2001-2002 academic year, effective September 26, 2001. The District arranged for Aaron to receive tutoring, which began one week later, on October 4, 2001. Plaintiffs claim that the tutoring was not timely commenced and was inadequate.

Complaint

The complaint before this Court sets forth five causes of action. In the first, plaintiffs claim that the icon did not constitute a true threat but rather was protected speech under the First Amendment. As such, they contend, the District's actions amounted to illegal retaliation against Aaron for his protected speech and deprived him of his First Amendment rights.

The second and third causes of action set forth claims under 42 U.S.C. § 1983 against the District and Superintendent Mabbett, respectively. These causes of action claim that defendants failed to train school staff in threat assessment, which failure resulted in Aaron's suspension in violation of his First Amendment rights.

The fourth cause of action asserts that the Board had a duty under section 3214 of the New York Education Law to conduct a thorough review of all record evidence before determining whether to suspend Aaron; that the Board had knowledge of the Sheriff's Department's and Dr. Lesswing's conclusion that Aaron did not pose a threat to anyone; and that despite that knowledge, the Board "knowingly, intentionally and/or negligently"

suspended Aaron in violation of its duties under section 3214.

The fifth cause of action claims that the District failed to comply with state law because it did not provide Aaron with timely and adequate alternative education. The complaint seeks compensatory damages for mental and emotional anguish and all other actual damages, as well as costs and attorneys' fees.

THE MOTION

In moving for summary judgment, defendants first contend that as a matter of law the icon is a true threat and thus not protected by the First Amendment. They next urge that plaintiffs' claims are barred by collateral estoppel stemming from the factual findings at the Superintendent's Hearing. In addition, defendants argue that all claims against defendant Superintendent Mabbett must be dismissed inasmuch as he did not participate in the decision to suspend Aaron, and in any event he is protected by qualified immunity. And finally, they argue for dismissal of the state law claims on various grounds.

APPLICABLE LAW

Standard on Summary Judgment Motion

A party moving for summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323

(1986). If the Court, viewing the evidence in the light most favorable to the nonmovant and drawing all reasonable inferences in its nonmovant's favor, determines that the movant has satisfied this burden, the burden then shifts to the nonmovant to adduce evidence establishing the existence of a disputed issue of material fact requiring a trial. *See Rarnseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). If the nonmovant fails to carry this burden, summary judgment is appropriate. *See Celotex*, 477 U.S. at 323.

First Amendment

The First Amendment protection of free speech does not extend to certain types of speech, including threats of violence. *See Watts v. United States*, 394 U.S. 705,707 (1969). The Second Circuit has observed that First Amendment protection is forfeited where "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution[.]" *United States v. Malik*, 16 F.3d 45, 51 (2d Cir. 1994) (quotation marks and citation omitted) (rejecting First Amendment defense by criminal defendant charged with mailing threatening letters, 18 U.S.C. § 876); *see Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (defining "true threat" as "serious expression of an intent to cause present or future harm," quoting *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002)).

In addressing whether a statement was constitutionally-protected political hyperbole or a true threat, the Supreme Court in *Watts* considered the context of the statement, whether it was conditional in nature, and the reaction of the listeners. 394 U.S. at 708; *see Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (stating that alleged threats should be considered in light of their entire factual context). Some courts have considered whether a reasonable person hearing the statement would interpret it as a serious threat, *see Doe*, 306 F.3d at 622, whereas other courts have asked whether the speaker would reasonably anticipate that the hearer would interpret the statement as a threat. *See Lovell*, 90 F.3d at 372. In *Malik*, the Second Circuit stated that the test of what constitutes a threat is "an objective one - namely, whether an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury." 16 F.3d at 49 (quotation marks and citation omitted); *accord, Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp.2d 421,435 (N.D.N.Y. 2005), *appeal dismissed in part*, 2006 WL 522102 (2d Cir.). The *Malik* court added that "proof of the effect of the alleged threat upon the addressee is highly relevant." *Id.*

Proof that the speaker lacked the intent or ability to carry out an alleged threat does not preclude a finding that it was a true threat. *See Porter*, 393 F.3d at 616; Doe, 306 F.3d at 625, n.3; *see also United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (stating that a threat "may affront such important social interests that it is punishable absent proof of a specific intent to carry

it into action" in criminal prosecution under 18 U.S.C. § 875(c) for transmitting a threat in interstate commerce). Provided that the speaker intentionally communicated the alleged threat to someone, it is not determinative that he did not communicate it directly to its object. *See Porter*, 393 F.3d at 616-18; Doe, 306 F.3d at 624-25.

Collateral Estoppel

Collateral estoppel, also referred to as issue preclusion, means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (internal quote omitted). It is settled that when a state administrative body acting in a judicial capacity resolves disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, "federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986).

New York State courts give quasi-judicial administrative fact-finding preclusive effect where there has been a full and fair opportunity to litigate, provided that the issue sought to be precluded is identical to a material issue necessarily decided in the administrative proceeding.[3] See Locurto v. Giuliani, __F.3d__, __,

[3] "The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a

2006 WL 1130906, *8 (2d Cir. 2006); Jeffreys v. Griffin, 1 N.Y.3d 34, 39 (2003); Ryan v. New York Tel. Co., 62 NY2d 494, 499-500 (1984). Where these requirements are met, school suspension proceedings under New York Education Law are entitled to preclusive effect in subsequent civil actions. See, e.g., Livolsi v. Hicksville Union-Free Sch. Dist., 693 N.Y.S.2d 617 (2d Dep't 1999) (holding that, where Commissioner approved five-day suspension under N.Y. Educ. Law § 3214(3)(b)(1), student and other plaintiffs were barred from relitigating the propriety of the suspension in a civil lawsuit).

DISCUSSION

Collateral Estoppel

Defendants argue that the application here of the doctrine of collateral estoppel warrants summary judgment in their favor on the First Amendment and section 1983 claims. As noted above, federal courts give preclusive effect to New York State quasi-judicial administrative factfinding, provided that the basic requirements of collateral estoppel are met, that is, that there has been a full and fair opportunity to litigate, and the issue sought to be precluded is identical to a material issue necessarily decided in the administrative proceeding. See University of Tennessee, 478 U.S. at 799; Locurto, 2006 WL

---

full and fair opportunity to litigate. Jeffreys v. Griffin, 1 N.Y.3d 34, 39 (2003)

1130906 at *8. This Court finds that these requirements are met in the instant case.

It is clear that the Superintendent's Hearing in this matter was a quasi-judicial proceeding. See N.Y. Educ.Law, § 3214(3)(c)(1).[4] The Hearing Officer was designated and the proceeding was properly handled in accordance with section 3214(3)(c)(1). Further, the record establishes as a matter of law that plaintiffs had a full and fair opportunity to litigate the issues in that hearing. It is undisputed that Aaron was represented by the same lawyer who represents plaintiffs in the instant action. Counsel called witnesses on Aaron's

---

[4] New York Education Law, § 3214(3)(c)(1) provides in part:

> No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf. Where a pupil has been suspended in accordance with this subdivision by a superintendent of schools, district superintendent of schools, or community superintendent, the superintendent shall personally hear and determine the proceeding or may, in his discretion, designate a hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in conjunction with the proceeding before him. A record of the hearing shall be maintained, but no stenographic transcript shall be required and a tape recording shall be deemed a satisfactory record. The hearing officer shall make findings of fact and recommendations as to the appropriate measure of discipline to the superintendent. The report of the hearing officer shall be advisory only, and the superintendent may accept all or any part thereof. An appeal will lie from the decision of the superintendent to the board of education who shall make its decision solely upon the record before it. The board may adopt in whole or in part the decision of the superintendent of schools....

behalf and cross-examined the District's witnesses. Plaintiffs' effort to challenge the legitimacy of the Superintendent's Hearing and thus to distinguish *University of Tennessee*, based on matters such as the number of witnesses called or the length of the proceeding, is unavailing. 478 U.S. at 799.

The Court turns to consider whether the issue sought to be precluded here is identical to a material issue necessarily decided in the administrative proceeding. The Hearing Officer made specific factual findings regarding the context of the icon. She found that both the object of the icon (Mr. VanderMolen) and a third party (the District) viewed it as a threat and that the District "had a legitimate concern and reason to believe these words and icons were anything but a joke." She found that Aaron had been present when students were advised that threats would not be treated as jokes. She found that Aaron provided "no explanation, justification or context for these icons being construed as jokes" and rejected his testimony that the icon was a joke. And she made the ultimate factual finding that Aaron "did commit the act of threatening a teacher." This finding was the basis for her recommendation, adopted by the Board, that Aaron be suspended. Clearly the question of whether Aaron's icon was a threat was a material factual issue necessarily decided in the administrative proceeding; it formed the basis of the decision to suspend him.

Moreover, the administrative finding that Aaron's icon was a threat is an ultimate factual finding on an issue which is identical to the issue sought to be precluded in this action, *i.e.*, whether the icon was a threat. As set forth above, the

administrative body explicitly based its decision on the following factors: the content of the icon; the context of the icon; the reaction of its object (Mr. VanderMolen); the reaction of a third party (the School); the reasonableness of the recipients' reactions; and the fact that Aaron had reason to know the recipients would view it as a threat. These factors are identical to factors bearing on whether a statement is a threat such that it is not protected by the First Amendment. *See Watts*, 394 U.S. at 708 (considering the context of the statement, its conditional nature,[5] and the reaction of listeners); *see also Doe*, 306 F.3d at 625; Lovell, 90 F.3d at 372; *Malik*, 16 F.3d at 49.

The Court rejects plaintiffs' contention, based on *Pappas v. Giuliani*, that the findings of fact in the Superintendent's Hearing are not entitled to preclusive effect. 118 F. Supp.2d 433 (S.D.N.Y. 2000), *affd. on other grounds*, 290 F.2d 143 (2d Cir. 2002). The district court decision in Pappas concerned whether administrative determinations of law are entitled to issue preclusion in a section 1983 action; it did not question the preclusive effect of administrative determinations of fact. In contrast, defendants in the case at bar rely on the administrative determinations of fact, not of law.[6]

Thus, the administrative finding that the icon was a threat, based on the context, hearers' reaction and other relevant factors, is entitled to preclusive effect in the present lawsuit. As a result,

---

[5] It cannot be reasonably argued that the words "Kill Mr. VanderMolen" are conditional in nature.

[6] Indeed, the Hearing Officer in the case at bar made no express legal determination regarding First Amendment protections, nor do defendants rely on any legal determination.

plaintiffs cannot prevail on their First Amendment claim or their claims under 42 U.S.C. § 1983, both of which are based on the First Amendment.[7] The first three causes of action must be dismissed.

First Amendment

In any event, as a matter of law, Aaron's icon constituted a true threat unprotected by the First Amendment. As is clear from the factual recitation above, virtually all material facts are undisputed. On their face, the words "Kill Mr. VanderMolen" and the accompanying graphic can not be viewed as anything but an unequivocal, unconditional, immediate threat of injury specific as to the person threatened, such as conveys a gravity of purpose and imminent prospect of execution. *See Malik*, 16 F.3d at 51. Likewise, the surrounding circumstances - including the effect of the icon on Mr. VanderMolen and School officials, Aaron's awareness of the School's position that a threat was not a joke, the absence of any factor to suggest that the icon was a joke, and the general increase in school violence - establish that an ordinary, reasonable recipient who is familiar with the context of the icon would interpret it as a serious threat of injury. *See id.*; *see generally Doe*, 306 F.3d at 625; *Lovell*, 90 F.3d at 372. Plaintiffs do not point to any material questions of fact regarding these circumstances.

There is no merit to plaintiffs' assertion that questions of fact exist due to the conclusions of the

---

[7] Plaintiffs argue in their Memorandum of Law in opposition to summary judgment that Aaron was denied due process in connection with his five-day suspension. The section 1983 causes of action are not, however, based on this claim.

Sheriff's Department and Dr. Lesswing that Aaron did not pose an actual threat and did not intend to carry out the threat. It is well established that lack of intention or ability to carry out a threat is not relevant. *See, e.g., Porter*, 393 F.3d at 616; *Doe*, 306 F.3d at 625, n.3; *Kelner*, 534 F.2d at 1027. Further,.to the extent that plaintiffs attempt to argue that Aaron's conduct was purely out-of-school conduct, the undisputed evidence establishes that the icon was a threat to kill a teacher at the School, that Aaron circulated it among classmates for three weeks; that he had no reasonable expectation that it would not come to the attention of School officials; that when it did so it caused a substantial disturbance at the School; that it is reasonable that it should have done so; and that Aaron had reason to expect that it would do so.

Thus, on this ground as well, the first three causes of action must be dismissed.

Qualified Immunity

Government officials performing discretionary functions enjoy a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action "generally turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* at

639 (citations and internal quotation marks omitted).

Even if the icon did not legally constitute an unprotected threat, under all of the circumstances discussed above, Superintendent Mabbett could reasonably have concluded that it did and that his actions were reasonable. As such, he is entitled to qualified immunity.

State Law Causes of Action

Having dismissed all federal claims, the Court in its discretion declines to retain supplemental jurisdiction over the state claims. They are dismissed without prejudice.

CONCLUSION

It is therefore

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that Causes of Action One, Two and Three of the Complaint are dismissed on the merits; and it is further

ORDERED that Causes of Action Four and Five are dismissed without prejudice.

IT IS SO ORDERED.

June 20, 2006
Syracuse, New York

/s Norman A. Mordue
Norman A. Mordue
Chief United States
District Court Judge

United States District Court
Northern District of New York
CIVIL JUDGMENT

Wisniewski, et al.

V. CASE NUMBER: 5:02-cv-1403 (NAM)

Board of Education, et al.

[X] Decision by Court. This action came to trial or hearing before the Court.
The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendant's [38] Motion for Summary Judgment is granted; Causes of action one, two and three of the Complaint are dismissed on the merits; Causes of action four and five are dismissed with prejudice. /

All of the above pursuant to the order of the Honorable Chief Judge Norman A. Mordue, dated the 20th day of June, 2006.

June 20th, 2006 **LAWRENCE K. BAERMAN**

DATE **CLERK OF COURT**

S/

KARA LOONEY
DEPUTY CLERK

United States District Court
Northern District of New York

AMENDED CIVIL JUDGMENT

Wisniewski, et al.

V. CASE NUMBER: 5:02-cv-1403 (NAM)

Board of Education, et al.

[X] Decision by Court. This action came to trial or hearing before the Court.
The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendant's [38] Motion for Summary Judgment is granted; Causes of action one, two and three of the Complaint are dismissed on the merits; Causes of action four and five are dismissed without prejudice.

All of the above pursuant to the order of the Honorable Chief Judge Norman A. Mordue, dated the 20th day of June, 2006.

June 30th, 2006 **LAWRENCE K. BAERMAN**

DATE **CLERK OF COURT**

s/ Judi L. Roberts
Judi L. Roberts
Courtroom Deputy Clerk

N.Y. Education Law § 3214 (2007)

§ 3214. Student placement, suspensions and transfers

1. School delinquent. A minor under seventeen years of age, required by any of the provisions of part one of this article to attend upon instruction, who is an habitual truant from such instruction or is irregular in such attendance or insubordinate or disorderly or disruptive or violent during such attendance, is a school delinquent.

2. Special day schools. The school authorities of any city or school district may establish schools or set apart rooms in public school buildings for the instruction of school delinquents, and fix the number of days per week and the hours per day of required attendance, which shall not be less than is required of minors attending the full time day schools.

2-a. a. Violent pupil. For the purposes of this section, a violent pupil is an elementary or secondary student under twenty-one years of age who:

(1) commits an act of violence upon a teacher, administrator or other school employee;

(2) commits, while on school district property, an act of violence upon another student or any other person lawfully upon said property;

(3) possesses, while on school district property, a gun, knife, explosive or incendiary bomb, or other dangerous instrument capable of causing physical injury or death;

(4) displays, while on school district property, what appears to be a gun, knife, explosive or

incendiary bomb or other dangerous instrument capable of causing death or physical injury;

(5) threatens, while on school district property, to use any instrument that appears capable of causing physical injury or death;

(6) knowingly and intentionally damages or destroys the personal property of a teacher, administrator, other school district employee or any person lawfully upon school district property; or

(7) knowingly and intentionally damages or destroys school district property.

b. Disruptive pupil. For the purposes of this section, a disruptive pupil is an elementary or secondary student under twenty-one years of age who is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom.

3. Suspension of a pupil.

a. The board of education, board of trustees or sole trustee, the superintendent of schools, district superintendent of schools or principal of a school may suspend the following pupils from required attendance upon instruction:

A pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others.

b. (1) The board of education, board of trustees, or sole trustee, superintendent of schools, district superintendent of schools and the principal of the school where the pupil attends shall have the power

to suspend a pupil for a period not to exceed five school days. In the case of such a suspension, the suspending authority shall provide the pupil with notice of the charged misconduct. If the pupil denies the misconduct, the suspending authority shall provide an explanation of the basis for the suspension. The pupil and the person in parental relation to the pupil shall, on request, be given an opportunity for an informal conference with the principal at which the pupil and/or person in parental relation shall be authorized to present the pupil's version of the event and to ask questions of the complaining witnesses. The aforesaid notice and opportunity for an informal conference shall take place prior to suspension of the pupil unless the pupil's presence in the school poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process, in which case the pupil's notice and opportunity for an informal conference shall take place as soon after the suspension as is reasonably practicable.

(2) A teacher shall immediately report and refer a violent pupil to the principal or superintendent for a violation of the code of conduct and a minimum suspension period pursuant to section twenty-eight hundred one of this chapter.

c. (1) [Until June 30, 2009] No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on

his or her behalf. Where the pupil is a student with a disability or a student presumed to have a disability, the provisions of paragraph g of this subdivision shall also apply. Where a pupil has been suspended in accordance with this subparagraph by a superintendent of schools, district superintendent of schools, or community superintendent, the superintendent shall personally hear and determine the proceeding or may, in his or her discretion, designate a hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in conjunction with the proceeding before him or her. A record of the hearing shall be maintained, but no stenographic transcript shall be required and a tape recording shall be deemed a satisfactory record. The hearing officer shall make findings of fact and recommendations as to the appropriate measure of discipline to the superintendent. The report of the hearing officer shall be advisory only, and the superintendent may accept all or any part thereof. An appeal will lie from the decision of the superintendent to the board of education who shall make its decision solely upon the record before it. The board may adopt in whole or in part the decision of the superintendent of schools. Where the basis for the suspension is, in whole or in part, the possession on school grounds or school property by the student of any firearm, rifle, shotgun, dagger, dangerous knife, dirk, razor, stiletto or any of the weapons, instruments or appliances specified in subdivision one of section 265.01 of the penal law, the hearing officer or superintendent shall not be barred from considering the admissibility of such weapon, instrument or appliance as evidence, notwithstanding a determination by a court in a

criminal or juvenile delinquency proceeding that the recovery of such weapon, instrument or appliance was the result of an unlawful search or seizure.

c. (1) [Eff June 30, 2009] No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf. Where a pupil has been suspended in accordance with this subdivision by a superintendent of schools, district superintendent of schools, or community superintendent, the superintendent shall personally hear and determine the proceeding or may, in his discretion, designate a hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in conjunction with the proceeding before him. A record of the hearing shall be maintained, but no stenographic transcript shall be required and a tape recording shall be deemed a satisfactory record. The hearing officer shall make findings of fact and recommendations as to the appropriate measure of discipline to the superintendent. The report of the hearing officer shall be advisory only, and the superintendent may accept all or any part thereof. An appeal will lie from the decision of the superintendent to the board of education who shall make its decision solely upon the record before it. The board may adopt in whole or in part the decision of the superintendent of schools. Where the basis for the suspension is, in whole or in part, the possession

on school grounds or school property by the student of any firearm, rifle, shotgun, dagger, dangerous knife, dirk, razor, stiletto or any of the weapons, instruments or appliances specified in subdivision one of section 265.01 of the penal law, the hearing officer or superintendent shall not be barred from considering the admissibility of such weapon, instrument or appliance as evidence, notwithstanding a determination by a court in a criminal or juvenile delinquency proceeding that the recovery of such weapon, instrument or appliance was the result of an unlawful search or seizure.

(2) Where a pupil has been suspended in accordance with this section by a board of education, the board may in its discretion hear and determine the proceeding or appoint a hearing officer who shall have the same powers and duties with respect to the board that a hearing officer has with respect to a superintendent where the suspension was ordered by him. The findings and recommendations of the hearing officer conducting the proceeding shall be advisory and subject to final action by the board of education, each member of which shall before voting review the testimony and acquaint himself with the evidence in the case. The board may reject, confirm or modify the conclusions of the hearing officer.

d. [Until June 30, 2008]

(1) Consistent with the federal gun-free schools act, any public school pupil who is determined under this subdivision to have brought a firearm to or possessed a firearm at a public school shall be suspended for a period of not less than one calendar year and any nonpublic school pupil participating in a program operated by a public school district using

funds from the elementary and secondary education act of nineteen hundred sixty-five who is determined under this subdivision to have brought a firearm to or possessed a firearm at a public school or other premises used by the school district to provide such programs shall be suspended for a period of not less than one calendar year from participation in such program. The procedures of this subdivision shall apply to such a suspension of a nonpublic school pupil. A superintendent of schools, district superintendent of schools or community superintendent shall have the authority to modify this suspension requirement for each student on a case-by-case basis. The determination of a superintendent shall be subject to review by the board of education pursuant to paragraph c of this subdivision and the commissioner pursuant to section three hundred ten of this chapter. Nothing in this subdivision shall be deemed to authorize the suspension of a student with a disability in violation of the individuals with disabilities education act or article eighty-nine of this chapter. A superintendent shall refer the pupil under the age of sixteen who has been determined to have brought a weapon or firearm to school in violation of this subdivision to a presentment agency for a juvenile delinquency proceeding consistent with article three of the family court act except a student fourteen or fifteen years of age who qualifies for juvenile offender status under subdivision forty-two of section 1.20 of the criminal procedure law. A superintendent shall refer any pupil sixteen years of age or older or a student fourteen or fifteen years of age who qualifies for juvenile offender status under subdivision forty-two of section 1.20 of the criminal procedure law, who

has been determined to have brought a weapon or firearm to school in violation of this subdivision to the appropriate law enforcement officials.

(2) Nothing in this paragraph shall be deemed to mandate such action by a school district pursuant to subdivision one of this section where such weapon or firearm is possessed or brought to school with the written authorization of such educational institution in a manner authorized by article two hundred sixty-five of the penal law for activities approved and authorized by the trustees or board of education or other governing body of the public school and such governing body adopts appropriate safeguards to ensure student safety.

(3) As used in this paragraph:

(i) "firearm" shall mean a firearm as defined in subsection a of section nine hundred twenty-one of title eighteen of the United States Code; and

(ii) "weapon" shall be as defined in paragraph 2 of subsection g of section nine hundred thirty of title eighteen of the United States Code.

d. [Eff June 30, 2008] Consistent with the federal gun-free schools act of nineteen hundred ninety-four, any public school pupil who is determined under this subdivision to have brought a weapon to school shall be suspended for a period of not less than one calendar year and any nonpublic school pupil participating in a program operated by a public school district using funds from the elementary and secondary education act of nineteen hundred sixty-five who is determined under this subdivision to have brought a weapon to a public school or other premises used by the school district to provide such programs shall be suspended for a period of not less

than one calendar year from participation in such program. The procedures of this subdivision shall apply to such a suspension of a nonpublic school pupil. A superintendent of schools, district superintendent of schools or community superintendent shall have the authority to modify this suspension requirement for each student on a case-by-case basis. The determination of a superintendent shall be subject to review by the board of education pursuant to paragraph c of this subdivision and the commissioner pursuant to section three hundred ten of this chapter. Nothing in this subdivision shall be deemed to authorize the suspension of a student with a disability in violation of the individuals with disabilities education act or article eighty-nine of this chapter. A superintendent shall refer the pupil under the age of sixteen who has been determined to have brought a weapon to school in violation of this subdivision to a presentment agency for a juvenile delinquency proceeding consistent with article three of the family court act except a student fourteen or fifteen years of age who qualifies for juvenile offender status under subdivision forty-two of section 1.20 of the criminal procedure law. A superintendent shall refer any pupil sixteen years of age or older or a student fourteen or fifteen years of age who qualifies for juvenile offender status under subdivision forty-two of section 1.20 of the criminal procedure law, who has been determined to have brought a weapon to school in violation of this subdivision to the appropriate law enforcement officials.

e. Procedure after suspension. Where a pupil has been suspended pursuant to this subdivision and

said pupil is of compulsory attendance age, immediate steps shall be taken for his or her attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to the provisions of article seven of the family court act. Where a pupil has been suspended for cause, the suspension may be revoked by the board of education whenever it appears to be for the best interest of the school and the pupil to do so. The board of education may also condition a student's early return to school and suspension revocation on the pupil's voluntary participation in counseling or specialized classes, including anger management or dispute resolution, where applicable.

f. [Until June 30, 2008] Whenever the term "board of education or superintendent of schools" is used in this subdivision, it shall be deemed to include community boards of education and community superintendents governing community districts in accordance with the provisions of article fifty-two-A of this chapter.

f. [Eff June 30, 2008] Whenever the term "board of education or superintendent of schools" is used in this subdivision, it shall be deemed to include community boards of education and community superintendents governing community districts in accordance with the provisions of article fifty-two-A of this chapter. For the purpose of this subdivision, the term "weapon" means a firearm as such term is defined in section nine hundred twenty-one of title eighteen of the United States code.

g. [Until June 30, 2009] Discipline of students with disabilities and students presumed to have a disability for discipline purposes.

(1) Notwithstanding any other provision of this subdivision to the contrary, a student with a disability as such term is defined in section forty-four hundred one of this chapter and a student presumed to have a disability for discipline purposes, may be suspended or removed from his or her current educational placement for violation of school rules only in accordance with the procedures established in this section, the regulations of the commissioner implementing this paragraph, and subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, as such federal law and regulations are from time to time amended. Nothing in this paragraph shall be construed to confer greater rights on such students than are conferred under applicable federal law and regulations, or to limit the ability of a school district to change the educational placement of a student with a disability in accordance with the procedures, in article eighty-nine of this chapter.

(2) As used in this paragraph:

(1) [(i)] [n1] a "student presumed to have a disability for discipline purposes" shall mean a student who the school district is deemed to have knowledge was a student with a disability before the behavior that precipitated disciplinary action under the criteria in subsection (k) (5) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute; and

(ii) a "manifestation team" means a representative of the school district, the parent or person in parental relation, and relevant members of the committee on special education, as determined by the parent or person in parental relation and the district.

(3) In applying the federal law consistent with this section:

(i) in the event of a conflict between the procedures established in this section and those established in subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, such federal statute and regulations shall govern.

(ii) the trustees or board of education of any school district, a district superintendent of schools or a building principal shall have authority to order the placement of a student with a disability into an appropriate interim alternative educational setting, another setting or suspension for a period not to exceed five consecutive school days where such student is suspended pursuant to this subdivision and, except as otherwise provided in clause (vi) of this subparagraph, the suspension does not result in a change in placement under federal law.

(iii) the superintendent of schools of a school district, either directly or upon recommendation of a hearing officer designated pursuant to paragraph c of this subdivision, may order the placement of a student with a disability into an interim alternative educational setting, another setting or suspension for up to ten consecutive school days, inclusive of any period in which the student is placed in an appropriate interim alternative educational setting,

another setting or suspension pursuant to clause (ii) of this subparagraph for the behavior, where the superintendent determines in accordance with the procedures set forth in this subdivision that the student has engaged in behavior that warrants a suspension, and, except as otherwise provided in clause (vi) of this subparagraph, the suspension does not result in a change in placement under federal law.

(iv) the superintendent of schools of a school district, either directly or upon recommendation of a hearing officer designated pursuant to paragraph c of this subdivision, may order the change in placement of a student with a disability to an interim alternative educational setting for up to forty-five school days under the circumstances specified in subsection (k)(1)(G) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute or a longer period where authorized by federal law under the circumstances specified in subsection (k)(1)(C) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, but in neither case shall such period exceed the period of suspension ordered by a superintendent in accordance with this subdivision.

(v) [Expires and repealed June 30, 2009] the terms "day," "business day," and "school day" shall be as defined in section 300.11 of title thirty-four of the code of federal regulations.

(vi) notwithstanding any other provision of this subdivision to the contrary, upon a determination by a manifestation team that the behavior of a student with a disability was not a manifestation of the

student's disability, such student may be disciplined pursuant to this section in the same manner and for the same duration as a nondisabled student, except that such student shall continue to receive services to the extent required under federal law and regulations, and such services may be provided in an interim alternative educational setting.

(vii) an impartial hearing officer appointed pursuant to subdivision one of section forty-four hundred four of this chapter may order a change in placement of a student with a disability to an appropriate interim alternative educational setting for not more than forty-five school days under the circumstances specified in subsections (k)(3) and (k)(4) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statutes, provided that such procedure may be repeated, as necessary.

(viii) nothing in this section shall be construed to authorize the suspension or removal of a student with a disability from his or her current educational placement for violation of school rules following a determination by a manifestation team that the behavior is a manifestation of the student's disability, except as authorized under federal law and regulations.

(ix) the commissioner shall implement this paragraph by adopting regulations which coordinate the procedures required for discipline of students with disabilities, and students presumed to have a disability for discipline purposes, pursuant to subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, with the

general procedures for student discipline under this section.

g. [Eff June 30, 2009] Discipline of students with disabilities and students presumed to have a disability for discipline purposes.

(1) Notwithstanding any other provision of this subdivision to the contrary, a student with a disability as such term is defined in section forty-four hundred one of this chapter and a student presumed to have a disability for discipline purposes, may be suspended or removed from his or her current educational placement for violation of school rules only in accordance with the procedures established in this section, the regulations of the commissioner implementing this paragraph, and subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, as such federal law and regulations are from time to time amended. Nothing in this paragraph shall be construed to confer greater rights on such students than are conferred under applicable federal law and regulations, or to limit the ability of a school district to change the educational placement of a student with a disability in accordance with the procedures in article eighty-nine of this chapter.

(2) As used in this paragraph, a "student presumed to have a disability for discipline purposes" shall mean a student who the school district is deemed to have knowledge was a student with a disability before the behavior that precipitated disciplinary action under the criteria in subsection (k) (8) of section fourteen hundred fifteen of title

twenty of the United States code and the federal regulations implementing such statute.

(3) In applying the federal law consistent with this section:

(i) in the event of a conflict between the procedures established in this section and those established in subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, such federal statute and regulations shall govern.

(ii) the trustees or board of education of any school district, a district superintendent of schools or a building principal shall have authority to order the placement of a student with a disability into an appropriate interim alternative educational setting, another setting or suspension for a period not to exceed five consecutive school days where such student is suspended pursuant to this subdivision and, except as otherwise provided in clause (vi) of this subparagraph, the suspension does not result in a change in placement under federal law.

(iii) the superintendent of schools of a school district, either directly or upon recommendation of a hearing officer designated pursuant to paragraph c of this subdivision, may order the placement of a student with a disability into an interim alternative educational setting, another setting or suspension for up to ten consecutive school days, inclusive of any period in which the student is placed in an appropriate interim alternative educational placement, another setting or suspension pursuant to clause (ii) of this subparagraph for the behavior, where the superintendent determines in accordance with the procedures set forth in this subdivision that

the student has engaged in behavior that warrants a suspension, and, except as otherwise provided in clause (vi) of this subparagraph, the suspension does not result in a change in placement under federal law.

(iv) the superintendent of schools of a school district, either directly or upon recommendation of a hearing officer designated pursuant to paragraph c of this subdivision, may order the change in placement of a student with a disability to an interim alternative educational setting for up to forty-five days, but not to exceed the period of suspension ordered by a superintendent in accordance with this subdivision, under the circumstances specified in subsection (k)(1) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute.

(v) the terms "day," "business day," and "school day" shall be as defined in section 300.9 of title thirty-four of the code of federal regulations.

(vi) notwithstanding any other provision of this subdivision to the contrary, upon a determination by the committee on special education that the behavior of a student with a disability was not a manifestation of the student's disability, such student may be disciplined pursuant to this section in the same manner as a nondisabled student, except that such student shall continue to receive services to the extent required under federal law and regulations.

(vii) an impartial hearing officer appointed pursuant to subdivision one of section forty-four hundred four of this chapter may order a change in placement of a student with a disability to an appropriate interim alternative educational setting

for not more than forty-five days under the circumstances specified in subsections (k)(2) and (k)(7) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statutes, provided that such procedure may be repeated, as necessary.

(viii) nothing in this section shall be construed to authorize the suspension or removal of a student with a disability from his or her current educational placement for violation of school rules following a determination by the committee on special education that the behavior is a manifestation of the student's disability, except as authorized under federal law and regulations.

(ix) the commissioner shall implement this paragraph by adopting regulations which coordinate the procedures required for discipline of students with disabilities, and students presumed to have a disability for discipline purposes, pursuant to subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the federal regulations implementing such statute, with the general procedures for student discipline under this section.

3-a. Teacher removal of a disruptive pupil. In addition, any teacher shall have the power and authority to remove a disruptive pupil, as defined in subdivision two-a of this section, from such teacher's classroom consistent with discipline measures contained in the code of conduct adopted by the board pursuant to section twenty-eight hundred one of this chapter. The school authorities of any school district shall establish policies and procedures to ensure the provision of continued educational

programming and activities for students removed from the classroom pursuant to this subdivision and provided further that nothing in this sub vision shall authorize the removal of a pupil in violation of any state or federal law or regulation. No pupil shall return to the classroom until the principal makes a final determination pursuant to paragraph c of this subdivision, or the period of removal expires, whichever is less.

a. [Until July 1, 2009] Such teacher shall inform the pupil and the school principal of the reasons for the removal. If the teacher finds that the pupil's continued presence in the classroom does not pose a continuing danger to persons or property and does not present an ongoing threat of disruption to the academic process, the teacher shall, prior to removing the student from the classroom, provide the student with an explanation of the basis for the removal and allow the pupil to informally present the pupil's version of relevant events. In all other cases, the teacher shall provide the pupil with an explanation of the basis for the removal and an informal opportunity to be heard within twenty-four hours of the pupil's removal, provided that if such twenty-four hour period does not end on a school day, it shall be extended to the corresponding time on the next school day.

a. [Eif July 1, 2009] Such teacher shall inform the pupil and the school principal of the reasons for the removal. If the teacher finds that the pupil's continued presence in the classroom does not pose a continuing danger to persons or property and does not present an ongoing threat of disruption to the

academic process, the teacher shall, prior to removing the student from the classroom, provide the student with an explanation of the basis for the removal and allow the pupil to informally present the pupil's version of relevant events. In all other cases, the teacher shall provide the pupil with an explanation of the basis for the removal and an informal opportunity to be heard within twenty-four hours of the pupil's removal.

b. [Until July 1, 2009] The principal shall inform the person in parental relation to such pupil of the removal and the reasons therefor within twenty-four hours of the pupil's removal, provided that if such twenty-four hour period does not end on a school day, it shall be extended to the corresponding time on the next school day. The pupil and the person in parental relation shall, upon request, be given an opportunity for an informal conference with the principal to discuss the reasons for the removal. If the pupil denies the charges, the principal shall provide an explanation of the basis for the removal and allow the pupil and/or person in parental relation to the pupil an opportunity to present the pupil's version of relevant events. Such informal hearing shall be held within forty-eight hours of the pupil's removal, provided that if such forty-eight hour period does not end on a school day, it shall be extended to the corresponding time on the second school day next following the pupil's removal. For purposes of this subdivision, "school day" shall mean a school day as defined pursuant to clause (v) of subparagraph three of paragraph g of subdivision three of this section.

b. [Eff July 1, 2009] The principal shall inform the person in parental relation to such pupil of the removal and the reasons therefor within twenty-four hours of the pupil's removal. The pupil and the person in parental relation shall, upon request, be given an opportunity for an informal conference with the principal to discuss the reasons for the removal. If the pupil denies the charges, the principal shall provide an explanation of the basis for the removal and allow the pupil and/or person in parental relation to the pupil an opportunity to present the pupil's version of relevant events. Such informal hearing shall be held within forty-eight hours of the pupil's removal.

c. [Until July 1, 2009] The principal shall not set aside the discipline imposed by the teacher unless the principal finds that the charges against the pupil are not supported by substantial evidence or that the pupil's removal is otherwise in violation of law or that the conduct warrants suspension from school pursuant to this section and a suspension will be imposed. The principal's determination made pursuant to this paragraph shall be made by the close of business on the school day next succeeding the end of the forty-eight hour period for an informal hearing contained in paragraph b of this subdivision.

c. [Eff July 1, 2009] The principal shall not set aside the discipline imposed by the teacher unless the principal finds that the charges against the pupil are not supported by substantial evidence or that the pupil's removal is otherwise in violation of law or that the conduct warrants suspension from school pursuant to this section and a suspension will be

imposed. The principal's determination made pursuant to this paragraph shall be made by the close of business on the day succeeding the forty-eight hour period for an informal hearing contained in paragraph b of this subdivision.

d. The principal may, in his or her discretion, designate a school district administrator, to carry out the functions required of the principal under this subdivision.

4. Expense.

a. The expense attending the commitment and costs of maintenance of any school delinquent shall be a charge against the city or district where he resides, if such city or district employs a superintendent of schools; otherwise it shall be a county charge.

b. The school authorities may institute proceedings before a court having jurisdiction to determine the liability of a person in parental relation to contribute towards the maintenance of a school delinquent under sixteen years of age ordered to attend upon instruction under confinement. If the court shall find the person in parental relation able to contribute towards the maintenance of such a minor, it may issue an order fixing the amount to be paid weekly.

5. Involuntary transfers of pupils who have not been determined to be a. student with a disability or a student presumed to have a disability for discipline purposes.

a. The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may transfer a pupil who has not been determined to be a student with a disability as defined in section forty-four hundred one of this chapter, or a student presumed to have a disability for discipline purposes as defined in paragraph g of subdivision three of this section from regular classroom instruction to an appropriate educational setting in another school upon the written recommendation of the school principal and following independent review thereof. For purposes of this section of the law, "involuntary transfer" does not include a transfer made by a school district as part of a plan to reduce racial imbalance within the schools or as a change in school attendance zones or geographical boundaries.

b. A school principal may initiate a non-requested transfer where it is believed that such a pupil would benefit from the transfer, or when the pupil would receive an adequate and appropriate education in another school program or facility.

No recommendation for pupil transfer shall be initiated by the principal until such pupil and a person in parental relation has been sent written notification of the consideration of transfer recommendation. Such notice shall set a time and place of an informal conference with the principal and shall inform such person in parental relation and such pupil of their right to be accompanied by counsel or an individual of their choice.

c. After the conference and if the principal concludes that the pupil would benefit from a transfer or that the pupil would receive an adequate and appropriate education in another school program or facility, the principal may issue a recommendation of transfer to the superintendent. Such recommendation shall include a description of behavior and/or academic problems indicative of the need for transfer; a description of alternatives explored and prior action taken to resolve the problem. A copy of that letter shall be sent to the person in parental relation and to the pupil.

d. Upon receipt of the principal's recommendation for transfer and a determination to consider that recommendation, the superintendent shall notify the person in parental relation and the pupil of the proposed transfer and of their right to a fair hearing as provided in paragraph c of subdivision three of this section and shall list community agencies and free legal assistance which may be of assistance. The written notice shall include a statement that the pupil or person in parental relation has ten days to request a hearing and that the proposed transfer shall not take effect, except upon written parental consent, until the ten day period has elapsed, or, if a fair hearing is requested, until after a formal decision following the hearing is rendered, whichever is later.

Parental consent to a transfer shall not constitute a waiver of the right to a fair hearing.

6. Transfer of a pupil. Where a suspended pupil is to be transferred pursuant to subdivision five of this

section, he or she shall remain on the register of the original school for two school days following transmittal of his or her records to the school to which he or she is to be transferred. The receiving school shall immediately upon receiving those records transmitted by the original school, review them to insure proper placement of the pupil. Staff members who are involved in the pupil's education must be provided with pertinent records and information relating to the background and problems of the pupil before the pupil is placed in a classroom.

7. [Expires and repealed June 30, 2008] Transfer of disciplinary records. Notwithstanding any other provision of law to the contrary, each local educational agency, as such term is defined in subsection twenty-six of section ninety-one hundred one of the Elementary and Secondary Education Act of 1965, as amended, shall establish procedures in accordance with section forty-one hundred fifty-five of the Elementary and Secondary Education Act of 1965, as amended, and the Family Educational Rights and Privacy Act of 1974, to facilitate the transfer of disciplinary records relating to the suspension or expulsion of a student to any public or nonpublic elementary or secondary school in which such student enrolls or seeks, intends or is instructed to enroll, on a full-time or part-time basis.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

UNITED STATES COURT OF APPEALS
FILED

OCT 26 2007

Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Date: DC Docket Number: 02-cv-1403
Docket Number: 06-3394-cv DC: NDNY (SYRACUSE)
Short Title: Wisniewski v. Board of Education
DC Judge: Honorable David Peebles
Honorable Norman Mordue

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of October two thousand seven.

Martin Wisniewski and Annette Wisniewski, on behalf of their son Aaron Wisniewski,

Plaintiffs-Appellants,

v.

Board of Education of the Weedsport Central School District and Richard Mabbett, Superintendent of Schools,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellants Martin Wisniewski, Annette Wisniewski and Aaron Wisniewski. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Joy Fallek
Motion Staff Attorney

October 26, 2007

Dennis G. O'Hara Esq.
O'Hara & O'Connell
7207 East Genesee Street
Fayetteville, NY 13066

RECEIVED
NOV 02 2007
O'HARA & O'CONNELL

84

2

FILED
FEB 28 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-987

IN THE

Supreme Court of the United States

MARTIN WISNIEWSKI and ANNETTE WISNIEWSKI,
on behalf of their son Aaron Wisniewski,

Petitioners,

v.

BOARD OF EDUCATION OF THE WEEDSPORT
CENTRAL SCHOOL DISTRICT and
RICHARD MABBETT, Superintendent of Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LOUIS ORBACH
Counsel of Record
JONATHAN B. FELLOWS
SUZANNE O. GALBATO
BOND, SCHOENECK & KING, PLLC
One Lincoln Center
Syracuse, New York 13202
(315) 218-8000

Attorneys for Respondents

214378

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	2
A. The "Kill Mr. VanderMolen" Icon	2
B. The District's Investigation	3
C. The Superintendent's Hearing	6
D. The Hearing Officer's Decision	10
E. The Appeal to the Board of Education ..	12
F. District Court's Decision on Respondents' Summary Judgment Motion	14
REASONS FOR DENYING THE PETITION	18
I. The Second Circuit Properly Applied This Court's Decision in *Tinker v. Des Moines Independent School District* and Found That Petitioners' "Kill Mr. VanderMolen" Icon Was Not Protected Speech.	19

Contents

Page

A. The Second Circuit Properly Applied *Tinker* Based on Overwhelming Evidence in the Record of the Nexus Between the Speech and the School. 19

B. Petitioners Failed to Identify a Split in the Circuit Courts of Appeal on the Issue of Whether *Tinker* Applies to Off Campus Speech With a Nexus to School That Causes Substantial Disruption. 22

C. The Second Circuit Was Not Required to Rule on the "True Threat" Issue In Order to Find a Nexus and Properly Apply *Tinker*. ... 26

D. Petitioners Had an Adequate Opportunity to Argue Whether the School District Could Punish Aaron for Off Campus Speech and The Second Circuit Properly Affirmed Based on *Tinker*, Even Though That Was Not the Primary Rationale for the Judgment Below. 27

II. The District's Threat Policy Was Not a *De Facto* Prior Restraint On Constitutionally Protected Student Speech and Does Not Warrant Review by this Court. 29

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

CASES

Boucher v. Schl. Board of Schl. District of Greenfield, 134 F.3d 821 (7th Cir. 1998) 25, 31

Chandler v. McMinnville Schl. Dist., 978 F.2d 524 (9th Cir. 1992) 23

Doe v. Pulaski Cty. Special Schl. Dist., 306 F.3d 616 (8th Cir. 2002) 15

Flaherty v. Keystone Oaks Schl. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003) 20

Greene v. United States, 13 F.3d 577 (2d Cir. 1994) 27

Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006) 22

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719 (1941) 27

Jacobs v. Board of Schl. Com'rs, 490 F.2d 601 (7th Cir. 1973), *vacated as moot* 420 U.S. 128, 95 S. Ct. 848 (1975) 29

J.C. v. Reg'l Schl. Dist. 10, 278 F.2d 119 (2d Cir. 2002) 28

Cited Authorities

Page

United States v. Kelner,
534 F.2d 1020 (2d Cir. 1976) 15

Killion v. Franklin Reg'l Schl. Dist.,
136 F. Supp. 2d 446 (W.D. Pa. 2001) 20, 25

Krumme v. Westpoint Stevens, Inc.,
238 F.3d 133 (2d Cir. 2000) 27

Latour v. Riverside Beaver Schl. District,
2005 U.S. Dist. LEXIS 35919
(W.D.Pa., August 24, 2005) 20, 30

Layshock v. Hermitage Schl. Dist.,
496 F. Supp. 2d 587 (W.D. Pa. 2007) 25

Lovell v. Poway Unified Sch. Dist.,
90 F.3d 367 (9th Cir. 1996) 15

United States v. Malik,
16 F.3d 45 (2d Cir. 1994) 15

Morse v. Frederick,
__ U.S. __, 127 S. Ct. 2618 (2007) ..... *passim*

Nitzberg v. Parkes,
525 F.2d 378 (4th Cir. 1975) 29

Ponce v. Socorro Indep. Schl. Dist.,
508 F.3d 765 (5th Cir. 2007) 24

Cited Authorities

Page

Porter v. Ascension Parish Schl. Bd.,
393 F.3d 608 (5th Cir. 2004) 15, 25

Readco, Inc. v. Marine Midland Bank,
81 F.3d 295 (2d Cir. 1996) 27

Saxe v. State College Area Schl. Dist.,
240 F.3d 200 (3d Cir. 2001) 23, 31

Shumway v. UPS,
118 F.3d 60 (2d Cir. 1997) 27

Singleton v. Wulff,
428 U.S. 106, 96 S. Ct. 2868 (1976) 29

Thomas v. Board of Education,
607 F.2d 1043 (2d Cir. 1979) 23

Tinker v. Des Moines Independent School District,
393 U.S. 503 (1969) ..... *passim*

Virginia v. Hicks,
539 U.S. 113, 123 S. Ct. 2191 (2003) 30

Watts v. United States,
394 U.S. 705, 89 S. Ct. 1399 (1969) 16, 26

Wisniewski v. Board of Education of the Weedsport Central School District and Richard Mabbett, Superintendent of Schools,
494 F.3d 34 (2d Cir. 2007) ..... *passim*

Cited Authorities

Page

CONSTITUTIONAL REFERENCES

U.S. Const., Amd. I 1, 2, 31

RULES

U.S. Supreme Court Rule 10 1

INTRODUCTION

Petitioners allude to a "growing conflict" in the circuits and "ongoing uncertainty as to the First Amendment protection afforded to off campus student speech" (Pet. Br. at 15) but have failed to present compelling reasons for their Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to be granted. *See* Sup. Ct. R. 10. In *Wisniewski v. Board of Education of the Weedsport Central School District and Richard Mabbett, Superintendent of Schools*, 494 F.3d 34 (2d Cir. 2007), the Second Circuit held that the school district did not violate Aaron Wisniewski's First Amendment rights when it suspended him for circulating an instant messenger icon that threatened a teacher and caused substantial disruption to the school. Petitioners failed to demonstrate that the opinions of other circuits conflict with the Second Circuit's application of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), to off campus speech or that the Second Circuit ruled on an important matter of federal law that has not been decided by this Court or that was decided differently by this Court. *See* Sup. Ct. R. 10(a)-(c). The Second Circuit properly analyzed off campus speech under *Tinker* and found no First Amendment violation, where it was reasonably foreseeable both that the speech would come to the attention of school officials and that it would cause substantial disruption in school. Petitioners also failed to demonstrate any compelling reasons why this Court should consider their belated challenge to the school district's threat policy as a prior restraint on student speech. Far from the boundary of uncertainty as to First Amendment protection for student speech,

Aaron's dissemination of an icon that threatened his teacher to fifteen classmates placed this case well within the *Tinker* analysis that the Second Circuit applied. Petitioners have failed to set forth compelling reasons for review and the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioners commenced this action on November 6, 2002, in the United States District Court for the Northern District of New York. They alleged that Respondents violated Aaron Wisniewski's First Amendment free speech rights, 42 U.S.C. § 1983 and the New York Education Law when they suspended him from school for one semester for circulating an "instant messenger" icon that threatened his teacher to approximately fifteen of his friends.

A. The "Kill Mr. VanderMolen" Icon

In April 2001, Aaron Wisniewski was an eighth grade student in the Weedsport Central School District ("District"). It is undisputed that Aaron created an "icon" that he attached to the instant messaging feature of his home computer. (JA 13). The icon included a crude drawing of a head with a gun pointed at it, and red blood splattering from the head along with the words "Kill Mr. VanderMolen." (JA 14). Aaron used the paint program on his computer to draw a head, a gun, and bullets, which were depicted as being shot out of the gun toward the person's face, with red blood spurting from the person's head. At the time Aaron created and transmitted the icon, Philip VanderMolen was his eighth grade English teacher. (JA 191). Aaron set up his instant messaging

"buddy list" so that the icon would be automatically circulated to anyone he communicated with via instant message. (JA 14). Aaron circulated the icon among fifteen of his friends for approximately three weeks during April 2001. (JA 14; 92). The friends were Aaron's classmates at school. The "Kill Mr. VanderMolen" icon would pop up on the screens of Aaron's "buddies" when he sent them an "instant message."

On March 29, 2001, Middle School Principal Linda Rice, together with the school psychologist, school social worker and guidance counselor, had visited each middle school classroom to discuss school violence. During the presentation, Principal Rice advised that all threats of violence would be taken seriously and would not be treated as jokes. (JA 74-77; 99-100). Aaron acknowledged that he was present for the session, and that he recalled Principal Rice saying that even jokes would be taken seriously. (JA 90; 244). Aaron created and circulated the icon not long after that session. (JA 91; 244).

B. The District's Investigation

The threatening icon first came to the attention of school officials on April 26, 2001. On April 25, 2001, another student of the District, Chad McDeid, sent Mr. VanderMolen an e-mail advising him of the threatening icon. The e-mail from Chad did not include the icon, but did identify the "screen name" that Aaron was using. When Mr. VanderMolen read the e-mail on the morning of April 26, 2001, he became concerned that a student wanted to kill him. (JA 80). He went to the office to bring the threat to the attention of Middle School Principal Linda Rice, but she was not present at the building.

Accordingly, he brought it to the High School Principal Barry Copeland, who was in the adjacent school building.

Principal Copeland observed Mr. VanderMolen to be distraught. Principal Copeland advised Mr. VanderMolen that he would be contacting the Sheriff's Department and sharing the information with the Superintendent and Middle School Principal for appropriate action.

After delivering the e-mail to the High School principal, Mr. VanderMolen was out of the school building for the balance of the school day on a field trip with students. (JA 82; 97).

On the morning of April 26, 2001, the Superintendent of Schools and Middle School Principal were at a United Way function in Auburn, New York. (JA 42; 295). High School Principal Copeland later arrived at the function, and reported the threat to Superintendent Mabbett. (JA 42-43; 295-96). Also present at the function was Lieutenant John Lamphere of the Cayuga County Sheriff's Department, and Superintendent Mabbett brought to his attention the information regarding the threat against Mr. VanderMolen. (JA 44-45; 297).

Superintendent Mabbett then returned to the school building, where he met with Middle School Principal Rice to discuss what investigation they would undertake to determine the nature of the threat. (JA 46-47). Superintendent Mabbett and Middle School Principal Rice interviewed Aaron Wisniewski. (JA 48-54; 304-07). Middle School Principal Rice began the interview by questioning Aaron as to whether he had any dangerous items in his possession. She then asked whether he had

any issues or concerns with any people in the building. She asked Aaron if he had sent a threatening message over e-mail, and Aaron said "he did not know anything about it." (JA 352). Aaron acknowledged that he was asked whether he had sent any e-mails threatening persons in the school, and he responded: "I was like, what are you talking about?" (JA 94). Principal Rice also asked Aaron about the "screen name," that was identified in Chad's e-mail to Mr. VanderMolen, and Aaron said it was an old screen name he was no longer using. Aaron was then sent back to his class. (JA 55). In addition to questioning Aaron, Principal Rice searched his backpack and his locker. (JA 63).

Superintendent Mabbett and Principal Rice then interviewed Chad McDeid. (JA 56). McDeid advised that the icon had been circulated to individuals on Aaron's instant messaging "buddy list." He identified Tim Church as another student on Aaron's "buddy list" who had seen the icon. (JA 65). They then interviewed Timothy Church, which by no means concluded the District's investigation, as Petitioners contend. (Pet. Br. at 8; JA 57; 66-68). Petitioners' description of what the student told administrators is also inaccurate. (Pet. Br. at 8). Tim Church provided a handwritten statement during the interview:

> I held a conversation with Aaron about his icon and I asked why he had that and he simply said "because I hate him and I don't like him." Then that brought me up to asking him why he doesn't like Mr. V and he said "because I don't like him, and I wish he were dead."

(JA 104).

After the school day was over, Chad McDeid returned home, obtained a printout of the icon, returned to school and gave it to Principal Rice. (JA 61). Mr. VanderMolen was also present when Chad returned with the icon and that is when he first saw the icon. (JA 81-82).

The next morning, April 27, 2001, Superintendent Mabbett, Principal Rice, Mr. and Mrs. Wisniewski and Aaron met with Lieutenant Lamphere at the District Office. (JA 58). During this meeting, Aaron admitted he created the icon. (JA 59; 317). Petitioners assert that the District violated Aaron's rights by refusing to allow him to question witnesses. (Pet. Br. at 10). That is not accurate. Principal Rice asked the Wisniewskis if they wanted to speak with Mr. VanderMolen, and Mrs. Wisniewski declined, stating that Mr. VanderMolen had been through enough. (JA 70; 99; 359).

Following this meeting, Principal Rice suspended Aaron from school for five days. (JA 69-73). She advised the parents of this suspension by letter dated April 27, 2001, which further advised that a Superintendent's Hearing had been recommended. (JA 106).[1]

C. The Superintendent's Hearing

On April 30, 2001, the District issued a Notice of a Superintendent's Hearing, scheduled for May 3, 2001. (JA 113). Prior to the hearing, plaintiff's attorney met with witnesses, including Mr. VanderMolen. (JA 109). The Superintendent's Hearing ultimately took place on

1. Petitioners allude to a procedural error but never raised it below.

May 29, 2001 before hearing officer Lynda VanCoske. At the outset of the hearing, it was stipulated that Superintendent Mabbett would recuse himself from making a decision on the hearing officer's findings and recommendation, and that the hearing officer's decision and recommendation on charges would be consolidated in a single process before the District's Board of Education to decide the charges and determine the penalty. (JA 175). At the hearing, Aaron was represented by his current attorneys. The District was represented by Attorney David Hoover. Aaron's parents were both present for the Hearing. The District called High School Principal Copeland, Mr. VanderMolen, Middle School Principal Rice and Chad McDeid as witnesses. (JA 110). During the hearing, Mr. VanderMolen testified that he became sick to his stomach when he learned of the threat and that he felt scared when he saw the icon. (JA 193). He further testified that he did not feel safe in the classroom with Aaron and that he therefore requested an alternative assignment. (JA 196).

Principal Rice testified about the interference the threat caused to school operations, and in particular that all of the students in Aaron's English class had to have a substitute teacher for the rest of the year. (JA 207). Principal Rice also testified about how she had visited every middle school classroom to discuss threats and school violence on March 29, 2001. (JA 209).

Aaron testified at the hearing. During his testimony, Aaron acknowledged that he was questioned on April 26, 2001 about having "sent threatening messages to other students regarding a faculty member," and that he responded "I said I don't have any idea what you're

talking about." (JA 237). Aaron further testified that later in the day a fellow student mentioned the icon to him and that is when he first realized that Superintendent Mabbett and Principal Rice were referring to the icon when they asked him about threatening messages about teachers. He acknowledged that he still did not come forward with the truth. (JA 243).

Aaron testified about his feelings towards Mr. VanderMolen, stating that Mr. VanderMolen is "not really popular" with the students because he gives a lot of homework. Aaron indicated that he thought Mr. VanderMolen was a tough grader and that he disagreed with Mr. VanderMolen's teaching methods. (JA 239).

Aaron testified that he created the icon "to be funny" and to "have people laugh at me and have it be a joke." (JA 236). In his hearing testimony, when asked how he felt about what he had done, he testified "I think it was a real stupid decision. I just hope I can learn from it and go on." (JA 245). On cross-examination, Aaron acknowledged that he had been present for Principal Rice's presentation on school violence, and that she had stated that threats would not be considered as jokes. (JA 91; 243). Aaron also admitted that he had not yet created the icon at the time of this presentation, but designed and circulated it *after* attending the school violence presentation. (JA 244).

In addition to the testimony and exhibits at the hearing, plaintiffs obtained a "threat assessment" from a psychologist, Norman J. Lesswing. The "threat assessment" is dated June 1, 2001, and was submitted

to the hearing officer after the hearing. (JA 110; 144-45). Dr. Lesswing's threat assessment was among the documents examined by both the hearing officer and the Board of Education.

The report of Dr. Lesswing indicated that based upon his visit to the home and an interview of Aaron, he had concluded that Aaron:

> does not pose any threat of harm or danger to Mr. VanderMolen, or anyone else for that matter. He possesses no violent intent, and has not displayed any interest in, access to, nor has he ever used firearms. However inappropriately expressed, Aaron's motivation in this matter was jocular, and in the context of private communication among friends outside of school.

(JA 144-45).

By letter dated June 3, 2001, the District submitted its closing statement. The District's closing statement asserted that the threatening icon was not subject to First Amendment protection. The District argued that notwithstanding Aaron's testimony that he intended to make people laugh at him, there was nothing about the icon which identified it as a joke or anything other than a serious statement. The District further noted the substantial disruption to the school as a result of the threatening icon. In light of the threat to his life, Mr. VanderMolen requested that he be reassigned to a different class and not teach Aaron's class. Mr. VanderMolen did not teach Aaron's section of eighth grade English for the balance of the year. (JA 154).

D. The Hearing Officer's Decision

On June 12, 2001, the hearing officer issued a decision. The hearing officer specifically analyzed whether the icon was a threat or a joke, and rejected the assertion that it was a joke:

> Aaron is unquestionably bright and articulate. His testimony that the icons and message were a joke was unconvincing, and he provided no explanation, justification or context for these icons being construed as jokes. Common sense dictates that without context or explanation, threatening words such as "Kill Mr. VanderMolen" are not a joke. Mr. VanderMolen did not take these words as a joke. Mr. VanderMolen testified that he was scared, concerned, and felt sick to his stomach upon reading the message. Until the issue was resolved, he asked to be removed from teaching Aaron's class because he felt uncomfortable teaching the class and was concerned about his and his six-month old child's safety. The district honored that request. Ms. Rice testified that Mr. VanderMolen appeared anxious and fearful.
>
> In addition, on approximately March 29, 2001, Ms. Rice, with the social worker and director of guidance, visited every class and spoke to students about the topic of threats. They advised students that any threats must be communicated to adults and that these threats will not be considered jokes. Aaron admits being present at that meeting. He heard Ms.

> Rice explain that threats were no joke, yet he still created the threat and icons after Ms. Rice's visit.

(JA 458). Contrary to Petitioners' assertions, the hearing officer considered the findings of the Sheriff's Department and Dr. Lesswing that Aaron did not intend to kill Mr. VanderMolen, but found that such intent to kill was not determinative of whether Aaron made a threat. (JA 460). The hearing officer concluded:

> As a result of the foregoing, I conclude Aaron did commit the act of threatening a teacher, in violation of page 11 of the student handbook, creating an environment threatening the health, safety and welfare of others, and his actions created a disruption in the school environment.
>
> I recommend a suspension of the first semester of the 2001-2002 academic year. Given the timing of the hearing, the delay in issuing the decision, due to waiting for Dr. Lesswing's conclusion, and delay in receiving Wisniewski's closing statement (on several occasions, I contacted Mr. O'Hara's office requesting the closing statement) and the decision so close to the last day of school, a suspension in the 2000-2001 year is not practical.

(JA 460-61).

E. The Appeal to the Board of Education

Following the decision of the hearing officer, the matter was set for hearing by the Board of Education to consider the findings and recommendations. By letter dated July 23, 2001, Petitioners' attorney requested that certain items be provided to the Board of Education for their review. (JA 118). On July 24, 2001, the Wisniewskis appeared with their attorney before the District's Board of Education. During the course of their argument, Petitioners objected to the adequacy of the transcript that had been prepared. The Board agreed to delay its consideration of the matter pending receipt of a corrected transcript. (JA 111).

By letter dated September 6, 2001, the attorney for the District sent the attorney for the Wisniewskis a revised transcript. By letter dated September 10, 2001, the Wisniewskis' attorney advised that he could stipulate to the changes, except for one. The attorney for the District agreed with the one change requested by the plaintiffs. The corrected transcript was then provided to the Board of Education. (JA 112).

On September 24, 2001, the Board of Education adopted a resolution accepting the findings of fact of the hearing officer and suspending Aaron for one semester.[2] The Board of Education stated that it had reviewed the charge, the exhibits, the report of Dr. Lesswing, the corrected transcript of the hearing, the closing

---

2. Petitioners did not allege below and cannot argue now that the Board approved the hearing officer's recommendation of a 30-day suspension as a "penalty" or retaliation for the Wisniewskis' rejection of the 30-day suspension compromise.

statements and letter memoranda presented by the attorneys for the District and the parents, and the decision of the hearing officer. (JA 259-60). The District immediately began steps to implement a program of alternative instruction which was provided during the period of the suspension.

On January 28, 2002, Aaron returned to school in the District at the completion of the suspension. He completed ninth and tenth grade in the District, but changed schools when his mother moved. (JA 95).

Mr. VanderMolen continued to teach in the District, but sought counseling as a result of the fear engendered by the death threat. (JA 84-85; 293). Mr. VanderMolen testified that he has never viewed the threat as a "joke," and that he has ongoing concerns about the threat in light of the fact that Aaron himself has never addressed the issue with Mr. VanderMolen, much less apologized to Mr. VanderMolen for his conduct. (JA 83; 86-89).

Following the Board's adoption of the hearing officer's recommendation of a one semester suspension, Petitioners chose not to appeal to the Commissioner of Education. Instead, they commenced this federal action the following year, alleging violations of Aaron's First Amendment rights, 42 U.S.C. § 1983 and state education law.

F. District Court's Decision on Respondents' Summary Judgment Motion

Following discovery, Respondents moved for summary judgment on grounds that Aaron's "Kill Mr. VanderMolen" icon was a threat which is not entitled to First Amendment protection. They also argued that the hearing officer's conclusion that Aaron threatened Mr. VanderMolen was entitled to preclusive effect because the threat issue was litigated in a quasi-judicial state administrative proceeding and is central to Petitioners' First Amendment claims. Respondents further argued that Superintendent Mabbett was entitled to qualified immunity and there was no factual or legal basis for the Petitioners' state education law claims.

The District Court granted Respondents' motion and dismissed the first three claims under the First Amendment and 42 U.S.C. § 1983. Chief Judge Mordue concluded that collateral estoppel barred the Wisniewskis from re-litigating the threat issue, which was fully litigated before the hearing officer in a properly conducted quasi-judicial state administrative proceeding. In addition, the District Court concluded with respect to Petitioners' First Amendment and Section 1983 claims that:

> . . . [V]irtually all material facts are undisputed. On their face, the words "Kill Mr. VanderMolen" and the accompanying graphic can not be viewed as anything but an unequivocal, unconditional, immediate threat of injury specific as to the person threatened, such as conveys a gravity of purpose and

imminent prospect of execution. *See Malik*, 16 F.3d at 51. Likewise, the surrounding circumstances – including the effect of the icon on Mr. VanderMolen and School officials, Aaron's awareness of the School's position that a threat was not a joke, the absence of any factor to suggest that the icon was a joke, and the general increase in school violence – establish that an ordinary, reasonable recipient who is familiar with the context of the icon would interpret it as a serious threat of injury. *See id.*; *see generally Doe*, 306 F.3d at 625; *Lovell*, 90 F.3d at 372. Plaintiffs do not point to any material questions of fact regarding these circumstances.

There is no merit to plaintiffs' assertion that questions of fact exist due to the conclusions of the Sheriff's Department and Dr. Lesswing that Aaron did not pose an actual threat and did not intend to carry out the threat. It is well established that lack of intention or ability to carry out a threat is not relevant. *See, e.g., Porter*, 393 F.3d at 616; *Doe*, 306 F.3d at 625, n.3; *Kelner*, 534 F.2d at 1027. **Further, to the extent that plaintiffs attempt to argue that Aaron's conduct was purely out-of-school conduct, the undisputed evidence establishes that the icon was a threat to kill a teacher at the School, that Aaron circulated it among classmates for three weeks; that he had no reasonable expectation that it would not come to the attention of School officials; that when it did so it caused a substantial disturbance at the School; that it is reasonable that it should**

> **have done so; and that Aaron had reason to expect that it would do so.**

(Pet. Br. at 34A-35A) (emphasis added). The Court also dismissed Petitioners' claim against Superintendent Mabbett, finding that he was entitled to qualified immunity. (Pet. Br. at 36A).

The Second Circuit affirmed the judgment of the District Court. The Court declined to resolve the dispute as to whether the claims were barred by collateral estoppel arising from the determinations in the Superintendent's hearing. Nor did the Second Circuit address the parties' dispute as to whether transmission of Aaron's icon constituted a true threat within the meaning of this Court's decision in *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969). Instead, the Second Circuit held that

> school officials have significantly broader authority to sanction student speech than the *Watts* standard allows. With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Wisniewski, 494 F.3d at 38.

The Second Circuit considered this Court's recent discussion of *Tinker* in *Morse v. Frederick*, __ U.S. __, 127 S. Ct. 2618 (2007): "*Tinker* held that student expression may not be suppressed unless school officials

reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 2626. The Second Circuit specifically noted that its holding did not conflict with *Morse* since this Court "had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities" because it rejected the argument that the speech was not "at school." *Wisniewski*, 494 F.3d at 39 n.3, citing *Morse*, __ U.S. at __, 127 S. Ct. at 2624. Applying *Tinker*, the Second Circuit held that Aaron's "Kill Mr. VanderMolen" icon

> crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.' (internal citations and quotations omitted). For such conduct, *Tinker* affords no protection against school discipline.

Wisniewski, 494 F.3d at 38-39.

REASONS FOR DENYING THE PETITION

Petitioners assert that review by this Court is warranted to "resolve the growing conflict in the circuits, and to eliminate the ongoing uncertainty as to the First Amendment protection afforded to off-campus student speech." (Pet. Br. at 15). Specifically, Petitioners claim that the circuits "appear to be developing conflicting opinions" on 1) the parameters for a public school district punishing a student for off campus speech and 2) whether a school district's policy to "take all threats seriously" operates as an unlawful prior restraint on speech. (Pet. Br. at 14-15). However, Petitioners have failed to demonstrate that there is a "growing conflict" in the circuits on the application of *Tinker* to off campus speech or that the Second Circuit applied *Tinker* in a way that was contrary to Supreme Court precedent. Nor have Petitioners shown compelling reasons for this Court to exercise its discretion to review whether the District's policy to take threats seriously operated as a prior restraint on speech especially when that issue was not raised below. In any event, punishment of the student following the disruption engendered by his threat to a teacher was not unlawful simply because the District advised students that it would take all threats seriously.

I. The Second Circuit Properly Applied This Court's Decision in *Tinker v. Des Moines Independent School District* and Found That Petitioners' "Kill Mr. VanderMolen" Icon Was Not Protected Speech.

Petitioners claim that the Second Circuit erroneously applied *Tinker*, or effectively "overruled" it by applying it to out-of-school speech without finding a "sufficient" nexus between the speech and the District. (Pet. Br. at 22). Petitioners also contend that it was unfair for the Second Circuit to affirm the judgment below based on *Tinker*, when, they claim, the District Court did not analyze the "Kill Mr. VanderMolen" icon under *Tinker* and they did not argue it below. For the reasons set forth below, Petitioners' arguments lack merit and do not warrant review of the Second Circuit's decision.

A. The Second Circuit Properly Applied *Tinker* Based on Overwhelming Evidence in the Record of the Nexus Between the Speech and the School.

Petitioners go to great lengths to emphasize the obvious point that Aaron created the icon outside of school (Pet. Br. at 17), but they fail to demonstrate why the Second Circuit's application of *Tinker* to off campus speech that caused a substantial disruption at school requires review. Petitioners' claim that the Second Circuit failed to find a sufficient nexus between Aaron's speech and the District is baseless. Petitioners argue that in *Morse v. Frederick* this Court recited "a litany of contextual factors in determining that the speech was school-related" but because those same factors are not present in this case, then there was no nexus between

the icon and the District, other than its content. (Pet. Br. at 18). Whether the same "contextual factors" that were present in *Morse* are present here is not dispositive. Petitioners cite no authority for their assertions that the content of the speech cannot form the nexus to school, that districts can only punish student speech "aimed at the school" or speech that is "inherently unconstitutional (*e.g.*, a true treat or incitement)." (Pet. Br. at 20).[3]

---

3. Petitioners cite several Pennsylvania district court decisions in which courts held that the school district could not punish a student for off campus speech. In each case, however, the District Court applied *Tinker*, but simply found insufficient evidence of nexus between the school district and the speech. *See e.g. Killion v. Franklin Reg'l Schl. Dist.*, 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001) (applying *Tinker* to "Top Ten" list created off campus which was vulgar and insulting to school coach and noting that "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."); *Flaherty v. Keystone Oaks Schl. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003); *Latour v. Riverside Beaver Schl. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. Aug. 24, 2005). The fact that off campus speech in those cases could not lawfully be punished by the district under *Tinker*, because there was little or no relation to the school, is wholly irrelevant to this case. Here, the Second Circuit found a nexus between the speech and the school district, in that the icon was communicated from one student to another, it targeted a teacher and it caused substantial disruption in the school. Furthermore, Petitioners inexplicably cite those Pennsylvania district court cases from 2001, 2003 and 2005 as an indication that district courts "appear to be interpreting *Morse* to recognize that off campus speech, *not* related to any district function, is outside 'the far reaches of what the First Amendment permits.'" (Pet. Br. at 17-18) (emphasis in original). It is not clear how Petitioners can claim that those cases demonstrate an interpretation of *Morse* that is somehow at odds with *Wisniewski* (Pet. Br. at 17-18) when those cases *pre-dated Morse*, and both the Pennsylvania district court cases and *Wisniewski*, (unlike *Morse*), involve off campus speech.

Here, the Second Circuit clearly acknowledged that Aaron made and circulated the "Kill Mr. VanderMolen" icon out of school, but found overwhelming record evidence of a nexus to school which made the *Tinker* analysis appropriate. Contrary to Petitioners' argument, the Second Circuit *did* find a nexus to school, just not on the same facts that in *Morse v. Frederick* led this Court to *reject* Morse's claim that his was not a school speech case. *See Morse*, __ U.S. at __, 127 S. Ct. at 2624. There is no basis for Petitioners' claim that the Second Circuit had to find the same *Morse* "contextual factors" in this case in order to apply *Tinker*. Here, the Second Circuit specifically set forth undisputed facts that constituted the nexus between the speech and school.

> [O]n the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable.

Wisniewski, 494 F.3d at 39-40. Petitioners cite no authority for the proposition that the threatening nature of the icon and the target of the threat cannot form the nexus. In any event, there was ample evidence of nexus beyond the content.

As this Court explained in *Morse v. Frederick*, "*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse v. Frederick*, __ U.S. at __, 127 S. Ct. at 2626 (quoting *Tinker*, 393 U.S. at 513, 89 S. Ct. at 740). Here, the Second Circuit simply applied that formulation of *Tinker* to hold that school discipline was proper where there could be "no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." *Wisniewski*, 494 F.3d at 40.

B. Petitioners Failed to Identify a Split in the Circuit Courts of Appeal on the Issue of Whether *Tinker* Applies to Off Campus Speech With a Nexus to School That Causes Substantial Disruption.

The Second Circuit's *Wisniewski* decision in no way "substantively overruled" *Tinker* by applying it to off campus speech, as Petitioners contend. There is nothing erroneous or even novel about the Second Circuit's application of *Tinker* to off campus speech in *Wisniewski*. Prior to *Morse*, in *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006), the Second Circuit summarized the framework for analyzing student speech as follows:

> We distill the following from *Tinker*, *Fraser* and [*Kuhlemeier*]: (1) schools have wide discretion to prohibit speech that is less than obscene – to wit, vulgar, lewd, indecent or

> plainly offensive speech; (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns"; and (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under [*Kuhlemeir*], the rule of *Tinker* applies. Schools may not regulate student speech unless it would materially and substantially disrupt classwork and discipline in the school.

(internal citations omitted). Well before that, the Second Circuit recognized in *Thomas v. Board of Education* that off campus conduct can create a foreseeable risk of disruption in school. 607 F.2d 1043, 1052 n.17 (2d Cir. 1979). Similarly, the Third Circuit in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001), found that "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under [*Kuhlmeier*], a school may regulate school-sponsored speech ... Speech falling outside these categories is subject to *Tinker*'s general rule ..." Likewise, the Ninth Circuit stated in *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992):

> We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude ... that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is

> governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*.

(internal citations omitted). The Second Circuit's application of *Tinker* in *Wisniewski* was in keeping with Supreme Court precedent and Petitioners failed to demonstrate that it conflicts with other Circuits' analysis of student speech cases.

Nor did *Morse* alter that framework; it simply permitted the school district to punish speech "reasonably viewed as promoting illegal drug use." *See Morse*, __ U.S. at __, 127 S. Ct. at 2625-28. Petitioners allude to "uncertainty" regarding the *Tinker* analysis and its application to off campus speech following *Morse*, but cite no cases demonstrating such uncertainty. At least one circuit has extended the rationale of *Morse* to find threats of mass violence in the school setting to be *per se* unprotected speech, but that only undermines Petitioners' argument. In *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007), the Court held that the threat of a mass school shooting was so devastating and particular to schools that it warranted a *Morse* analysis:

> [i]f school administrators are permitted to prohibit student speech that advocates illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students," *Morse*, 127 S. Ct. at 2638, then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.

See Ponce, 508 F.3d at 771-72.

Finally, Petitioners argue that this is a case on the "outer boundary" where there is uncertainty as to when courts should apply the *Tinker* standard to off campus speech, citing *Morse*, 127 S. Ct. at 2624, and *Porter v. Ascension Parish Schl. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (Pet. Br. at 16-17). The uncertainty noted in *Porter* related to off campus speech brought on campus without the knowledge or permission of the speaker. 393 F.3d at 619. Even in *Porter*, a case Petitioners cite to bolster their claim of uncertainty, the Court acknowledged that:

> [m]any courts have applied the *Tinker* standard in evaluating off-campus student speech later brought on-campus by persons other than the speaker. [citing *Boucher*, *Beussink* and *Killion*, among others]. Although reaching differing conclusions as to the legality of restrictions placed upon the speech in question, these cases consistently approach off-campus speech brought on-campus as subject to regulation under *Tinker's* 'material and substantial' disruption test.

Id. Likewise, in *Layschock v. Hermitage Sch. Dist.*, a district court case on which Petitioners implicitly rely (Pet. Br. at 18-20), the Court applied *Tinker* and analyzed the questions of nexus and substantial disruption in the context of off campus speech. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007) (applying *Tinker* to student's MySpace profile of principal for which he was suspended, but finding insufficient nexus). Here, Aaron's purposeful dissemination of an icon depicting the shooting of a teacher to fifteen classmates brought this case well within the reach of *Tinker*.

Having shown no conflict among the circuits, and no way in which the decision below decided the constitutionality of the speech in a way that conflicts with any relevant decisions of this Court, the petition should be denied.

C. The Second Circuit Was Not Required to Rule on the "True Threat" Issue In Order to Find a Nexus and Properly Apply *Tinker*.

The Second Circuit ruled that the *Watts* true threat analysis was too narrow a lens through which to view the District's punishment of the student:

> [W]e think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows. With respect to school officials' authority to discipline a student's expression, reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker* . . .

Wisniewski, 494 F.3d at 39. Petitioners blatantly mischaracterize that holding in an effort to bolster their "nexus" argument: Petitioners claim that "if there is no showing that Aaron's Buddy Icon was a true threat, as the Second Circuit held, the nexus to the District no longer exists." (Pet. Br. at 19). The decision that Aaron's "Kill Mr. VanderMolen" icon need not rise to the level of a "true threat" to be subject to discipline by the District is fully consistent with *Tinker*. The speech clearly had a "nexus" to the school: it was about a teacher, circulated

to students, and soon arrived at the school. When it arrived at school it created a disruption that would reasonably have been foreseen.

D. Petitioners Had an Adequate Opportunity to Argue Whether the School District Could Punish Aaron for Off Campus Speech and The Second Circuit Properly Affirmed Based on *Tinker*, Even Though That Was Not the Primary Rationale for the Judgment Below.

Petitioners claim that it was unfair for the Second Circuit to decide this case under *Tinker* because the briefing below and the District Court's opinion involved the true threat analysis, not *Tinker*. (*See* Pet. Br. at 14, selectively relying on only the portion of the rule in *Hormel v. Helvering*, 312 U.S. 552, 61 S. Ct. 719 [1941] which states that appellate courts generally do not consider issues that were not raised below).[4] Petitioners' argument distorts the District Court's opinion.

---

4. Petitioners ignore that *Hormel* went on to explain that rule was not absolute and actually considered the issue not raised below. Petitioners also ignore the well-established rule that "an appellate court may affirm the judgment of the district court on any ground appearing in the record . . . [and] may affirm the grant of summary judgment on grounds different from those relied on by the court below." *Shumway v. UPS, Inc.*, 118 F.3d 60, 63 (2d Cir. 1997). The Second Circuit has "repeatedly recognized that the rule is not an absolute bar 'where the issue is purely legal and there is no need for additional fact-finding' or 'where consideration of the issue is necessary to avoid manifest injustice.'" *Krumme v. Westpoint Stevens, Inc.*, 238 F.3d 133, 142, citing *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996); *see also Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994).

Regardless of whether the District Court cited *Tinker*, it explicitly rejected Petitioners' argument that Aaron's "Kill Mr. VanderMolen" icon was out of school speech for which the District could not constitutionally punish the student. The District Court held:

> Further, to the extent that plaintiffs attempt to argue that Aaron's conduct was purely out-of-school conduct, the undisputed evidence establishes that the icon was a threat to kill a teacher at the School, that Aaron circulated it among classmates for three weeks; that he had no reasonable expectation that it would not come to the attention of School officials; that when it did so it caused a substantial disturbance at the School; that it is reasonable that it should have done so; and that Aaron had reason to expect that it would do so.

(Pet. Br. at 35A). Petitioners cannot complain that they did not have an opportunity to refute the application of *Tinker* to Aaron's speech when the District Court specifically recited the undisputed "contextual factors" linking the icon to the school, found that it was reasonably foreseeable that the icon would come to the attention of school officials, and that it was reasonably foreseeable that it would cause a substantial disruption at the school. *Id.* Finally, whether a sufficient nexus exists based on those undisputed facts is a question of law, which was properly resolved by the Second Circuit, regardless of whether Petitioners' appeal centered on *Tinker*. *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002). Even if *Tinker* issues had not been addressed below, the Second Circuit properly exercised its discretion to affirm on the basis of *Tinker*.

II. The District's Threat Policy Was Not a *De Facto* Prior Restraint On Constitutionally Protected Student Speech and Does Not Warrant Review by this Court.

Petitioners assert without substantiation that the circuits are "developing conflicting opinions" and that there is uncertainty on the question of whether a school district may use an internal policy to take threats seriously to manufacture a "subjective 'substantial disruption.'" (Pet. Br. at 14-15). Petitioners argue that the Second Circuit's finding of a substantial disruption caused by the "Kill Mr. VanderMolen" icon was flawed because it was based on an impermissibly broad policy to "take all threats seriously."[5] (Pet. Br. at 23). Even if Petitioners' challenge were not moot because Aaron is no longer a student in the District, Petitioners fail to demonstrate any conflict in the opinions of the circuit courts of appeal or advance any other arguments that would support review of the District's threat policy by this Court.

---

5. Petitioners raise for the first time in this Court that the District's policy on threats was an unlawful prior restraint. The Second Circuit did not address this question. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976). Although the bar against raising new issues may be overcome to avoid manifest injustice, no such interest would be served by considering the prior restraint issue here, where Aaron is no longer a student in the District and Petitioners' challenge is therefore moot. Petitioners cite *Jacobs v. Board of School Com'rs*, 490 F.2d 601, 604-05 (7th Cir. 1973) (Pet. Br. at 24), but acknowledge that the overbreadth and vagueness challenges to the policy at issue were vacated as moot by this Court because the student graduated. *Jacobs*, 420 U.S. 128 (1975). Petitioners' reliance on *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975), is also to no avail because the parties in that case, unlike here, stipulated that the student was still in school.

Petitioners cannot repackage their appeal of the substantial disruption finding under the guise of a prior restraint challenge. Aaron was punished for threatening a teacher in violation of certain provisions of the student handbook. He was punished after the disruption occurred. The District did not "manufacture" the disruption through an impermissibly broad "no threats" policy, as Petitioners claim. The District's "no threat" policy did not restrain otherwise protected speech. The District's threat policy, far from being overly broad or vague, reinforced that it was reasonably foreseeable that the icon Aaron purposely constructed and circulated to the very same students who heard the warnings about threats, would come to the attention of the school administrators and the target of the threat. The District did not "manufacture" the disruption through an impermissibly broad "no threats" policy, as Petitioners claim.

Petitioners' reliance on *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191 (2003) is misplaced, since it involved an overbreadth challenge to a trespass ordinance that involved potential criminal penalties. The concerns raised in *Hicks* that an overly broad law would "chill" protected speech are not present here, where the speech involves threats. Petitioners' reliance on *Latour v. Riverside Beaver Sch. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. Aug. 24, 2005), likewise is not helpful. In *Latour*, the court found no substantial disruption under *Tinker* because the disruption at issue was actually caused by the student body's reaction to the actions the school administrators took with respect to the speech at issue. *Latour* did not involve a specific threat to a school teacher. Here, unlike *Latour*, Aaron's

"Kill Mr. VanderMolen" icon itself caused the substantial disruption at school and the disruption was not created by the policy to take all threats seriously. In this case, the Second Circuit held that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." *Wisniewski*, 494 F.3d at 40. Accordingly, there was no prior restraint of protected speech. Regardless of whether the risk of substantial disruption was based on Mr. VanderMolen's reaction to the icon or the District's investigation of it, Petitioners have advanced no basis for granting review of that aspect of the Second Circuit's decision.

In any event, even if they had not already announced their policy to take all threats seriously, District administrators would have been obligated to investigate Aaron's threats of violence and were not required to wait until a "substantial disruption" had already occurred. School officials may take action if they have a "specific and significant fear of disruption." *Saxe v. State College Area Sch. Dist.*, 240 F.3d at 214; *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998) (school need not demonstrate actual harm to take disciplinary actions). To the extent that the investigation itself would cause the disruption, that, too, was a reasonably foreseeable consequence of circulating an icon that threatened a teacher, whether or not the District had an announced policy to take all threats seriously, and did not violate the First Amendment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition in its entirety.

Dated: February 28, 2008

Respectfully submitted,

LOUIS ORBACH
Counsel of Record
JONATHAN B. FELLOWS
SUZANNE O. GALBATO
BOND, SCHOENECK & KING, PLLC
One Lincoln Center
Syracuse, New York 13202
(315) 218-8000

Attorneys for Respondents